(10) No. 02-258-CSX Title: Susan Jinks, Petitioner
v.
Richland County, South Carolina

Docketed: August 20, 2002 Court: Supreme Court of South Carolina

Entry	Date	Proceedings and Orders
	Jul 18 2002	Petition for writ of certiorari filed. (Response due September 19, 2002)
	Sep 19 2002	Brief of respondent Richland County in opposition filed.
	Oct 2 2002	DISTRIBUTED for Conference of October 18, 2002
	Oct 21 2002	Petition GRANTED. SET FOR ARGUMENT March 5, 2003. **********
	Oct 31 2002	Motion of the United States for leave to intervene filed.
	Nov 4 2002	Motion DISTRIBUTED. November 8, 2002 (page 12)
	Nov 12 2002	Motion of the United States for leave to intervene GRANTED.
	Nov 19 2002	Respondent's response to motion of the United States to Intervene.
	Nov 26 2002	Motion of the parties to dispense with printing the joint appendix filed.
	Dec 4 2002	Brief of United States filed.
	Dec 5 2002	Brief of petitioner Susan Jinks filed.
	Dec 5 2002	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
	Dec 16 2002	Motion of the parties to dispense with printing the joint appendix GRANTED.
	Jan 2 2003	Motion of the Solicitor General for divided argument filed.
	Jan 3 2003	Order extending time to file respondent's brief on the merits to and including January 15, 2003.
	Jan 15 2003	Brief of respondent Richland County filed.
	Jan 15 2003	Brief amici curiae of Alabama, et al. filed.
	Jan 15 2003	Brief amici curiae of Council of State Governments, et al. filed.
	Jan 17 2003	Record filed.
	Jan 22 2003	CIRCULATED.
	Jan 27 2003	Motion of the Solicitor General for divided argument GRANTED.
	Feb 3 2003	Motion of amici curiae Alabama, et al. and respondent to allow Alabama, et al. to participate in oral argument as amici curiae and for divided argument filed.
	Feb 21 2003	Reply brief of petitioner Susan Jinks filed.
	Feb 21 2003	Motion of amici curiae Alabama, et al. and respondent to allow Alabama, et al. to participate in oral argument as amici curiae and for divided argument DENIED.
	Mar 5 2003	ARGUED.

1pp

Supreme Court, U.S.
FILED

02 258 JUL 18 2002

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

BRADFORD P. SIMPSON
SUGGS AND KELLY, P.A.
Post Office Box 8113
Columbia, S.C. 29202
(803) 461-2163

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2874

John D. Kassel
Theile Branham
KASSEL LAW FIRM
Post Office Box 1476
Columbia, SC 29202
(803) 256-4242
*Counsel of Record

James Mixon Griffin
SIMMONS AND GRIFFIN, LLC
Post Office Box 5
Columbia, SC 29202
(803) 779-4600
Counsel for Petitioners

70 pp

QUESTION PRESENTED

The federal supplemental jurisdiction statute includes a provision, 28 U.S.C. § 1367(d), that tolls the period of limitations for supplemental claims while they are pending in federal court and for 30 days after they are dismissed. The question presented is whether the tolling provision invades state sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause.

PARTIES TO THE PROCEEDINGS

Petitioner is Susan Jinks. Respondent is Richland County.

STATEMENT UNDER RULE 29.4(b)

Because the proceeding draws into question the constitutionality of 28 U.S.C. § 1367(d), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, 28 U.S.C. § 2403(a) is applicable.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

STATEMENT UNDER RULE 29.4(b) iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX F) 2

INTRODUCTION 2

REASONS FOR GRANTING THE PETITION 5

I. THIS CASE SATISFIES SEVERAL KEY CONSIDERATIONS THAT GUIDE THIS COURT'S DISCRETION TO GRANT CERTIORARI 5

A. A State Supreme Court Has Invalidated a Federal Statute on Federal Constitutional Grounds 6

B. The Decision below Conflicts with Decisions of Other Courts 6

C. The Issue Presented is Recurring and of Great Practical Significance 8

D. South Carolina's Reasoning Would Override All Federal Authority to Stay State Court Proceedings 10

II. THE DECISION BELOW IS INCORRECT 13

A. Enactment of the Tolling Provision Is Within Congress's Constitutional Authority 13

B. Section 1367(d) Violates Neither the Necessary and Proper Clause nor the Tenth Amendment 19

C. The Tolling Provision Prevents Discrimination Against a Federal Right 26

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Ableman v. Booth, 62 U.S. 506 (1858) 25
Alden v. Maine, 527 U.S. 706 (1999) 4, 25
Arizona v. Evans, 514 U.S. 1 (1995) 6
Armstrong v. Manzo, 380 U.S. 545 (1965) 19
Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993) 11
Beck v. Prupis, 162 F.3d 1090 (11th Cir. 1998) 7-8, 9, 17
Blinn Florida Dep't of Transp., 781 So. 2d 1103 (Fla. 1st DCA 2000) 7 n.2
Bowen v. City of New York, 476 U.S. 467 (1986) 13
Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891 (6th Cir. 2001) 16
Brewer v. City of El Cerrito, 666 F. Supp. 1346 (N.D. Cal. 1987) 17
Brickley v. United States (In re Brickley), 70 B.R. 113 (9th Cir. BAP 1986) 11
Brown v. City of Boston, 98 F.3d 1333, 1996 WL 590553 (1st Cir. 1996)(unpublished) 7-8
Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) 24
Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 9-10, 17, 21
Carr v. CIGNA Sec., Inc., 95 F.3d 544 (7th Cir. 1996) 16
Christopher v. Harbury, 122 S.Ct. 2179 (2002) 19
City of Los Angeles v. Superior Court, 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978) 16 n.5
Conroy v. Aniskoff, 507 U.S. 511 (1993) 12
Davis v. Wechsler, 263 U.S. 22 (1923) 26-27
Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001) 13
Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 26-27
Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 17

Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260 (D.C. Cir. 1995) 10
Edwards v. Okaloosa County, 5 F.3d 1431 (11th Cir. 1993) 8-9, 17
Estate of Fennell ex rel. Fennell v. Stephenson, 137 N.C. App. 430, 528 S.E.2d 911 (N.C. App. 2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (N.C. 2001) 7
Financial General Bankshares, Inc. v. Metzger, 680 F.2d 768 (D.C. Cir. 1982) 17
Finley v. United States, 490 U.S. 545 (1989) 14 n.4, 14-15
Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) 7
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 20
Graham v. Joh Deere Co., 383 U.S. 1 (1966) 20
Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 657 F. Supp. 1037 (D. Ariz. 1987) 17
Hauser v. Mealey, 263 N.W.2d 803 (Minn. 1978) 16 n.5
Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000) 7-8, 24-25
Henson v. Columbus Bank & Trust Co., 651 F.2d 320 (5th Cir. 1981) 8-9, 17, 18
Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n, 362 S.E.2d 176 (S.C. 1987) 16
Honda v. Clark, 386 U.S. 484 (1967) 13
Howlett v. Rose, 496 U.S. 356 (1990) 26
In re DiCamillo, 186 B.R. 59 (E.D. Pa. 1995) 11
Independent Union of Flight Attendants v. Pan American World Airways, Inc., 966 F.2d 457 (9th Cir. 1992) 11
International Games, Inc. v. Sims, 444 N.E.2d 736 (1982) .. 16 n.5
James v. Kentucky, 466 U.S. 341 (1984) 26
Jinks v. McCaulley, 163 F.3d 598 (4th Cir. 1998) 3, 4
Jinks v. Richland County, 563 S.E.2d 104 (S.C. 2002) ..... *passim*
L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc., 454 So. 2d 506 (Ala. 1984) 16 n.5, 17
Lee v. Kemna, 534 U.S. 362, 122 S.Ct. 877 (2002) 26-27
Lynn v. City of Jackson, 63 S.W.3d 332 (Tenn. 2001) 7 n.1
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19
Mathews v. Eldridge, 424 U.S. 319 (1976) 19
McCall v. Batson, 329 S.E.2d 741 (S.C. 1985) 22 n.6

McLaughlin v. Campbell, 410 F. Supp. 1321 (D. Mass. 1976) 9, 18
Minnesota v. National Tea Co., 309 U.S. 551 (1940) 6
Moates v. Bobb, 470 S.E.2d 402 (S.C. Ct. App. 1996) 24
Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672 (S.C. 2000). 24
Murphy v. John Hofman Co., 211 U.S. 562 (1909) 14 n.3
Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967) 26
Neal v. District of Columbia, 131 F.3d 172 (D.C. Cir. 1997) 7-8
Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) 13
Newman v. Burgin, 930 F. 2d 955 (1st Cir. 1991) 17
O'Brien v. Continental Ill. Nat'l Bank & Trust Co., 593 F.2d 54 (7th Cir. 1979) 8-9, 17
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 8, 23-24
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 14
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 14 n.3
Pointer v. Western Heights Independent School Dist., 919 P.2d 5 (Okla. 1996) 7
Raygor v. Regents of the University of Minnesota, 534 U.S. 533, 122 S.Ct. 999 (2002) 2
Rheaume v. Texas Dep't of Public Safety, 666 F.2d 925 (5th Cir. 1982) 9, 18
Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292 (2d Cir. 1990) 14 n.4
Seabrook v. Jacobson, 153 F.3d 70 (2d Cir. 1998) 8
Stevens v. ARCO Management of Washington D.C., Inc., 751 A.2d 995 (D.C. Ct. App. 2000) 7
Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949) 16
U.S. Industries, Inc. v. Blake Construction Co., 671 F.2d 539 (D.C. Cir. 1981) 9, 18
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 9, 14, 16, 24
Wood v. DeWeese, 305 F. Supp. 939 (W.D. Ky. 1969) 12
Yakus v. United States, 321 U.S. 414 (1944) 20

Younger v. Harris, 401 U.S. 37 (1971) 18, 21

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, sec. 8, cl. 18 ..... *passim*
U.S. Const. art. III 14, 21, 25
U.S. Const. art. VI, cl. 2 25
U.S. Const. amend. V 9, 19, 27
U.S. Const. amend. X ..... *passim*
U.S. Const. amend. XIV 27

STATUTES

11 U.S.C. § 108(c) 11
11 U.S.C. § 362 11
11 U.S.C. § 362(a) 11
28 U.S.C. § 1367(c)(3). 4
28 U.S.C. § 1367(d) ..... *passim*
42 U.S.C. § 1983 ..... 3, 6
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 12
Government Tort Liability Act, Tenn. Code Ann. §§ 29-20-201 *et seq.* 7 n.1
Judicial Improvements Act. Pub. L. No. 101-650, 104 Stat. 5089 (1990) 15
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525 (1994 ed.) 12
South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001). 3, 22 n.6
Y2K Act, 15 U.S.C. § 6606(e)(4) 12

RULES

S. Ct. Rule 10(b) 6
S. Ct. Rule 10(c) 6

OTHER AUTHORITIES

ALI, Study of the Division of Jurisdiction Between State and Federal Courts ix (1969) 15
Federal Courts Study Committee Implementation Act of 1990, 104 Stat. 5104 (1990) 15

Federal Study Committee, Report of the Federal Courts Study Committee (Apr. & Jul. 1990) 15
Oakley, John B., *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855 (1998). 10
Story, Joseph, Commentaries on the Constitution § 1238 (1833) 20-21
Wechsler, Herbert, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216 (1948) 15
Wright, Charles Alan, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure (Supp. 2002) 14 n.4, 15, 27

No. 02-

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

PETITION FOR A WRIT OF CERTIORARI

Susan Jinks respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App. A, *infra*, 2a-10a) is reported at 563 S.E.2d 104. The judgment of the South Carolina Court of Common Pleas (App. B, *infra*, 11a-12a) is unreported. The opinion of the U.S. Court of Appeals for the Fourth Circuit (App. C, *infra*, 13a-20a) is reported at 163 F.3d 598 (table)(per curiam)(unpublished). The Order of the United States District Court for South Carolina (App. D, *infra*, 21a-22a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered April 22, 2002. App. A, 2a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX F)

The relevant provisions of the Necessary and Proper Clause, the Supremacy Clause, the Third Article, the Fifth Amendment, the Tenth Amendment, and the Fourteenth Amendment to the United States Constitution are reproduced at App. F, *infra*, 26a.

28 U.S.C. § 1367 is reproduced at App. F, *infra*, 28a.

The relevant provision of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001) is reproduced at App. F, *infra*, 30a.

INTRODUCTION

In *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 122 S.Ct. 999 (2002), this Court held that the tolling provision, 28 U.S.C. § 1367(d), that is part of the federal supplemental jurisdiction statute, cannot constitutionally apply to claims filed in federal court against nonconsenting States. In the course of that decision, this Court indicated that there might be some "serious constitutional doubt" as to whether the tolling provision impermissibly abrogates state sovereignty "when a State consents to suit or when a defendant is not a State." *Id.*, 122 S.Ct. at 1006, 1008. This case raises that unanswered question.

Unlike the situation in *Raygor*, there is no Eleventh Amendment issue in this case. Petitioner sued a county defendant and one of its employees in federal court. The

federal district court granted summary judgment for the defendants on the federal claim. The statute of limitations issue arose only after the federal court dismissed the action in its entirety and the supplemental claims were refiled in state court. It is clear that federal district court could have entertained the state causes of action without raising any issue about state sovereignty or the statute of limitations. After the case moved from federal to state court, however, the South Carolina Supreme Court ruled that it was untimely and that section 1367(d) violated the Tenth Amendment and the Necessary and Proper Clause by unconstitutionally extending the state's statute of limitations.

STATEMENT OF THE CASE

Carl H. Jinks died of complications associated with alcohol withdrawal on October 18, 1994 at Respondent Richland County's Detention Center within four days of his arrest for failure to pay $1500 in child support. *Jinks v. Richland County*, 563 S.E.2d 104, 105 (S.C. 2002). At the time of his arrest, Respondent was put on notice that Jinks was suffering from alcohol withdrawal, a diagnosis confirmed by subsequent examination by Dr. Charles Eskridge, the detention center physician, who wrote a prescription for Jinks that was never administered. *See Jinks v. McCaulley*, 163 F.3d 598 (4th Cir. 1998)(table)(per curiam)(unpublished), App. C, *infra*, 13a [herinafter "*McCaulley*"]. In 1996, within the applicable state statute of limitations, Petitioner Susan Jinks brought an action against the county and its physician-employee in the United States District Court for the District of South Carolina, raising claims under 42 U.S.C. § 1983 and supplemental claims for wrongful death and survival under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001). *Jinks*, 563 S.E.2d at 105. On November 20, 1997, the district court granted defendants' motions for summary judgment on the Section 1983 claim. *Id.* On December 3, 1997, the court issued an order declining

to exercise jurisdiction over the remaining state claims and dismissed the state claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *Id.* The Fourth Circuit subsequently affirmed the district court's rulings. *McCaulley*, 163 F.3d 598 (4th Cir. 1998)(table).

On December 18, 1997, fifteen days after the district court dismissed her action and while the federal appeal was pending, Petitioner filed a wrongful death and survival action in the Court of Common Pleas for Richland County. *Jinks*, 563 S.E.2d at 105. Her filing was well within the 30-day tolling period provided by 28 U.S.C. § 1367(d). After trial, a jury returned a verdict of $80,000 in actual damages in favor of Petitioner and against Richland County in the wrongful death action. It returned defense verdicts on the wrongful death action for Dr. Eskridge and on the survival action for both defendants. *Id.* After denial of its post-trial motions, Richland County appealed to the South Carolina Supreme Court. *Id.*

That court held 28 U.S.C. § 1367(d) unconstitutional, reasoning that it interferes "with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause." *Id.* at 108. In reaching that conclusion, the state Supreme Court held that, while "necessary" as a useful aid to federal jurisdiction, the tolling provision was not "'proper' within the meaning of the Necessary and Proper Clause. . . . [because it] interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.* at 107. Further, citing this Court's decision in *Alden v. Maine*, 527 U.S. 706, 749 (1999), the State Supreme Court declared that "the State has the authority to determine *whether* it consents to suit within its own court system." 563 S.E.2d at 107 (emphasis in original). It then found that such consent exists only to the extent permitted by the state Tort Claims Act. *Id.* at 108. The court further held that, by extending the time period for waiver of sovereign immunity of the state's political

subdivisions, section 1367(d) exercised an attribute of state sovereignty, in violation of the Tenth Amendment. *Id.*

REASONS FOR GRANTING THE PETITION

The decision below of the South Carolina Supreme Court invalidates an important and frequently utilized federal law, in conflict with decisions of other state courts of last resort, United States courts of appeal, and a venerable holding of this Court. It represents the first court to find that section 1367(d), the tolling provision in the federal supplemental jurisdiction statute, is unconstitutional and thus void. It creates confusion on an important and frequently recurring issue of law and raises profound questions about the practical viability of the supplemental jurisdiction statute enacted by Congress in 1990. By virtue of the decision, federal courts may feel compelled to retain jurisdiction over supplemental claims better heard in state courts to avoid limitations problems. Alternatively, plaintiffs may be forced to forego their right to go to federal court when the cause of action includes a supplemental claim. Both results would frustrate the design and purpose of the supplemental jurisdiction statute.

In addition, the reasoning of the South Carolina Supreme Court, if upheld, would invalidate a wide variety of federal statutes and other exercises of federal judicial authority that stay state court proceedings.

Only this Court can resolve the problems created by the South Carolina decision and bring clarity to this important area of federal law.

I. THIS CASE SATISFIES SEVERAL KEY CONSIDERATIONS THAT GUIDE THIS COURT'S DISCRETION TO GRANT CERTIORARI

A. A State Supreme Court Has Invalidated a Federal Statute on Federal Constitutional Grounds

Certiorari is necessary because the decision of South Carolina's court of last resort invalidated a federal statute on federal constitutional grounds. One of the principal considerations governing the exercise of this Court's discretion to grant certiorari is whether a state court "has decided an important question of federal law that has not been, but should be settled by this Court." S. Ct. Rule 10(c). The rule assures that "'important federal issues . . . will reach this Court for adjudication [and] that state courts will not be the final arbiters of important issues under the federal constitution.'" *Arizona v. Evans*, 514 U.S. 1, 9 (1995)(quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). The rule further assures uniform application in the federal and state courts of an important congressional enactment.

In this instance, the South Carolina Supreme Court has invalidated a twelve-year-old federal law that has significant implications for litigants' access to justice. This law is frequently utilized, especially by litigants like Petitioner, who assert a violation of her constitutional and civil rights under 42 U.S.C. § 1983 and who has a state cause of action emanating from the same set of facts. Because section 1367(d) is a critical component of an important federal law that is frequently utilized and whose validity is now in doubt, the South Carolina decision poses an important question of federal law that should be settled by this Court.

B. The Decision below Conflicts with Decisions of Other Courts

This case also involves a decision of a state court of last resort on "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." S. Ct. Rule 10(b).

Several state courts of last resort have considered the application of section 1367(d). None have found it infirm or even found reason to doubt its constitutionality.[1] *See, e.g., Stevens v. ARCO Management of Washington D.C., Inc.*, 751 A.2d 995 (D.C. Ct. App. 2000)(applying tolling provision). *See also Estate of Fennell ex rel. Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (N.C. App. 2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (N.C. 2001)(reversing application of § 1367(d) on non-constitutional grounds); *Pointer v. Western Heights Independent School Dist.*, 919 P.2d 5, 7 (Okla. 1996)(suggesting that § 1367(d) would apply in appropriate case).[2]

Similarly, United States courts of appeals have regularly applied section 1367(d), when appropriate, without finding any constitutional dilemma. In fact, the very existence of section 1367(d) has encouraged federal appellate courts to mandate modification of district court orders so as "to dismiss the pendent state claim without prejudice and to toll the period of limitations." *Franklin v. Zain*, 152 F.3d 783, 786 (8th Cir. 1998). In other instances, circuit courts have found no abuse of discretion when the district court has dismissed the action without prejudice *because* section 1367(d)'s tolling provision saved the right to

---

[1] Only one other state supreme court has found that § 1367(d) cannot apply to cases where governmental immunity was waived for a limited period of time. In that instance, it did so without engaging in any federal constitutional analysis. *Lynn v. City of Jackson*, 63 S.W.3d 332 (Tenn. 2001)(holding, in accord with longstanding state precedent, that general savings statutes do not apply to extend the time for filing actions under the state Government Tort Liability Act, Tenn. Code Ann. §§ 29-20-201 *et seq.*).

[2] At least one lower state court addressed the constitutional issue. In that instance, it found section 1367(d) a valid exercise of congressional authority. *See Blinn Florida Dep't of Transp.*, 781 So. 2d 1103, 1108-10 (Fla. 1st DCA 2000).

go to state court despite the expiration of the limitations period. *See Hedges v. Musco*, 204 F.3d 109, 123-24 (3d Cir. 2000); *Seabrook v. Jacobson*, 153 F.3d 70, 72 (2d Cir. 1998); *Beck v. Prupis*, 162 F.3d 1090, 1099 (11th Cir. 1998); *Neal v. District of Columbia*, 131 F.3d 172, 175 n.5 (D.C. Cir. 1997); *Brown v. City of Boston*, 98 F.3d 1333, 1996 WL 590553, *1 (1st Cir. 1996)(unpublished)(App. E, 23a).

Equally important, the South Carolina Supreme Court's decision conflicts with the holding of this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348 (1944), wherein this Court declared that an otherwise applicable state statute of limitations "can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." That decision found that the purposes of notice and the avoidance of stale claims undergirding the state limitations period had been served by timely adjudication in a federal forum. Section 1367(d) operates on the same principle examined in *Railroad Telegraphers*. It provides a small and finite window in which a plaintiff may refile in state court if the limitations period expired during the pendency of the federal district court action.

C. The Issue Presented is Recurring and of Great Practical Significance

With both the constitutional validity and the state courts' acceptance of section 1367(d) in doubt, the resulting confusion on an important and recurring question of federal law provides an independently sufficient and compelling reason to grant certiorari in this case. The decision below, if allowed to stand unexamined, may well create a train wreck in the courts from inconsistent treatment of cases involving supplemental jurisdiction. Federal courts may unnecessarily retain jurisdiction and hear cases more suitable to state court adjudication, with adverse consequences for the federal docket and for the concept of comity. In some circuits, this

was the state of affairs before the 1990 enactment of the supplemental jurisdiction statute. *See, e.g., Edwards v. Okaloosa County*, 5 F.3d 1431, 1435 (11th Cir. 1993)(pre-1990 claim); *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981)(per curiam); *O'Brien v. Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54, 65 (7th Cir. 1979).

This Court has held that the decision to retain jurisdiction to hear the state claim is a matter "of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). If, however, the limitations period elapses while the federal case is pending, considerations of due process and decisions like those cited *infra* from the Fifth and Eleventh Circuits will transform that matter of discretion into one of plaintiff's right. *See Beck*, 162 F.3d at 1100 (collecting cases). In fact, several cases held, pre-section 1367(d), that district courts must grant a motion to reconsider if a state court found that the statute of limitations precluded it from hearing the supplemental claim. For example, the Fifth Circuit instructed that "if the district court determines that the pendant claim should be dismissed by the federal court and [the plaintiff] later discovers that his case is time barred in the state court, *the federal district court should grant a motion for reconsideration* of whether or not the federal court will exercise its pendent jurisdiction to hear the state law claim." *Rheaume v. Texas Dep't of Public Safety*, 666 F.2d 925, 932 (5th Cir. 1982)(emphasis added). *See also U.S. Industries, Inc. v. Blake Construction Co.*, 671 F.2d 539, 551 (D.C. Cir. 1981); *Henson, supra*; *McLaughlin v. Campbell*, 410 F. Supp. 1321, 1326 (D. Mass. 1976).

The continuing doubt about section 1367(d)'s validity will also chill litigants' pursuit of federal causes of action in federal court for fear that those causes could be dismissed some time after the state causes become time-barred. Section 1367(d)'s tolling provision limits the need for federal courts to adjudicate matters more properly heard in state

court. As such section 1367(d) addresses a concern expressed by this Court that a statute of limitations not operate to "foreclose some plaintiffs from litigating their state-law claims, [or] . . . chill other plaintiffs from bringing their federal-law claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 352 n.9 (1988).

The District of Columbia Circuit has recognized that section 1367(d) "reduces one concern expressed in Carnegie-Mellon – that plaintiffs would lose their claims if their case were dismissed rather than remanded." *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1267 (D.C. Cir. 1995). Professor John Oakley, reporter for the American Law Institute's Federal Judicial Code Revision Project, confirms this understanding: "Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling." John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998).

Elimination or invalidation of section 1367(d) will either remove the discretion that district courts enjoy, add to the docket of an already overtaxed federal court system, and downgrade considerations of comity that might otherwise hold that these cases are more appropriately heard in state court – or, it will force plaintiffs' to forego their right, confirmed by Congress, to bring their actions initially in federal court, for fear of losing their state claim altogether.

D. South Carolina's Reasoning Would Override All Federal Authority to Stay State Court Proceedings

The South Carolina Supreme Court's decision rests on a determination that statutes of limitation are an attribute of state sovereignty that brook no federal interference,

regardless of the purpose or constitutional basis of the authority. *Jinks*, 563 S.E.2d at 108. The court conceded that section 1367(d) is an "'aid to the exercise of federal jurisdiction,' and, therefore, is 'necessary' within the meaning of the Necessary and Proper Clause [, U.S. Const. Art. I, Sec. 8, cl. 18], but asserted it cannot be "proper" within the meaning of that Clause. *Id.* at 107.

That reasoning casts doubt on the constitutionality of a variety of federal statutes that impose stays upon state courts and state court procedures. For example, federal bankruptcy law imposes an automatic stay on all judicial proceedings against the debtor. 11 U.S.C. § 362(a). The stay serves a two-fold purpose: (1) providing the debtor with a breathing spell from its creditors and saving the debtor from expending resources in other litigation; and, (2) creating order among potential creditors by preventing them from pursuing their own remedies separate from the bankruptcy proceedings. *See Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992). Because a statute of limitations might expire during the course of the automatic stay, the Bankruptcy Code provides a 30-day savings period that operates identically to section 1367(d). 11 U.S.C. § 108(c). Numerous courts have recognized that "[t]his section extends the statute of limitations for creditors in actions against the debtor, where the creditor is hampered from proceeding outside the bankruptcy court due to the provisions of 11 U.S.C. § 362 [the automatic stay provision]." *In re DiCamillo*, 186 B.R. 59, 61 (E.D. Pa. 1995)(quoting *Brickley v. United States (In re Brickley)*, 70 B.R. 113 (9th Cir. BAP 1986)). *See also Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993)(Section 108(c) "extended [the limitations period] for 30 days after notice of the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date.").

Because the bankruptcy stay operates as an "aid to the exercise of federal jurisdiction" in the same manner as

section 1367(d), South Carolina's reasoning would mandate that it be found unconstitutional.

The rationale behind the *Jinks* ruling would also adversely affect the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525 (1994 ed.), which tolls legal actions involving those in the armed services during their military service. The Act has not been challenged on Tenth Amendment grounds, even though its application to military personnel who are not experiencing exigent circumstances would seem to have a lesser justification for congressional intrusion on state court matters. *See Conroy v. Aniskoff*, 507 U.S. 511 (1993).

The *Jinks* ruling also calls into question the validity of the federal Y2K Act, 15 U.S.C. § 6606(e)(4)(tolling during notice and remediation period for Year 2000-related claims) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 (setting uniform limitations-period commencement date in suits under state law for damages due to hazardous release exposure).

In sum, this Petition presents an issue of great federal importance with ramifications for a wide variety of statutes.

The South Carolina ruling also raises serious questions about a federal court's authority to stay state proceedings as a matter of inherent judicial power. Section 1367(d) tolling works in a fashion that is similar to a federal court's authority to stay pending state proceedings during removal as a "protective device which keeps separate tribunals from adjudicating the merits of the same controversy." *Wood v. DeWeese*, 305 F. Supp. 939, 941 (W.D. Ky. 1969).

The decision below even casts doubt on the authority this Court may exercise during the pendency of a petition

for certiorari, wherein a single justice of this Court may stay a state court of last resort's final judgment. *See, e.g., Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975)(Blackmun, J.)("As a single Justice, I clearly have the authority to grant a stay of a state court's 'final judgment or decree' that is subject to review by this Court on writ of certiorari."). Obviously, the exercise of such authority is an "aid to jurisdiction" in the same sense as section 1367(d).

Moreover, this Court has recognized that equitable tolling is permissible when consistent with congressional intent in enacting a particular statutory scheme. *See Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Honda v. Clark*, 386 U.S. 484 (1967). The equitable tolling doctrine generally permits a statute of limitations to be tolled provided that there is timely notice, lack of prejudice to the defendant, reasonable and good faith conduct on the part of the plaintiff, and a prayer for the same remedies in each forum. *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131, 1133 (9th Cir. 2001).

Section 1367(d) operates in similar fashion to the equitable tolling doctrine. It is difficult to imagine how it, supported by statutory authority, can be unconstitutional when equitable tolling is not.

II. THE DECISION BELOW IS INCORRECT

A. Enactment of the Tolling Provision Is Within Congress's Constitutional Authority

Congress enacted section 1367(d), of the supplemental jurisdiction statute as part of a larger response to a set of problems identified by this Court, other courts, the Federal Courts Study Commission, the American Law Institute, and legal scholars.

Federal courts had long exercised the authority now known as supplemental jurisdiction as a matter of inherent judicial authority. Chief Justice John Marshall wrote as far back as 1824 that once a federal court found a "sufficient foundation for jurisdiction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). *Osborn* further recognized that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal c]ourts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.* at 823. By 1966, it was firmly established that when federal and state claims "derive from a common nucleus of operative fact," Article III of the Constitution "permits the conclusion that the entire action before the court comprises but one constitutional case." *Gibbs*, 383 U.S. at 725.

The judicial authority to exercise such supplemental jurisdiction was recognized repeatedly by this Court,[3] until *Finley v. United States*, 490 U.S. 545, 549, 556 (1989), raised serious questions about whether congressional authorization was a necessary prerequisite to the exercise of that authority.[4] This Court strongly suggested that Congress

---

[3] *See, e.g., Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117, 120 (1984); *Murphy v. John Hofman Co.*, 211 U.S. 562, 569 (1909).

[4] As the Second Circuit observed, after *Finley*, "the continued viability of the doctrine of pendent party jurisdiction in any context is seriously in question." *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1295 (2d Cir. 1990). *See also* 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3523.1, at 154 (Supp. 2002)(citation omitted)(indicating that purpose of supplemental jurisdiction law was to overrule the restrictions emanating from *Finley*).

resolve the uncertainty. *Id.* at 556. In light of *Finley* and similar decisions, the Federal Courts Study Committee recommended that Congress enact authorizing legislation. Federal Study Committee, Report of the Federal Courts Study Committee, pt. II, at 47 (Apr. & Jul. 1990). The Federal Courts Study Committee Implementation Act of 1990, 104 Stat. 5104 (1990), which addressed supplemental jurisdiction, was incorporated, as Title III, into the Judicial Improvements Act. Pub. L. No. 101-650, 104 Stat. 5089 (1990).

The tolling provision at issue here was a part of that enactment and was derived from a study of the American Law Institute. That study came about at the request of Chief Justice Earl Warren. ALI, Study of the Division of Jurisdiction Between State and Federal Courts ix (1969)(quoting Chief Justice Earl Warren, Opening Address to the 36th Annual Meeting of the American Law Institute (May 1959)). Even earlier, Professor Herbert Wechsler suggested that a tolling provision was a necessary ingredient in any statutory resolution of the issues surrounding supplemental jurisdiction. Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 233 (1948). The ALI study suggested that a tolling provision be adopted for all claims initially filed in federal court which that court later determines should be tried in state court. *See* ALI Study, at 65. It argued that such a provision was necessary "as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available." *Id.* at 453.

Tolling addressed a palpable dilemma faced by plaintiffs with both federal and state claims. Claim preclusion forced plaintiffs seeking vindication of their rights in federal court to include the state claims that arise from the same nucleus of facts in their lawsuit. *See* 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4412, p. 287. South Carolina, as most states, holds that a

"litigant is barred from raising any issues which were adjudicated in the former suit and *any issues which might have been raised in the former suit.*" *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n*, 362 S.E.2d 176, 177 (S.C. 1987)(emphasis added).[5] A plaintiff, choosing to adjudicate in the federal forum, as is his or her right, must raise and cannot separately litigate the state-based causes of action.

At the same time, notions of comity, judicial economy, convenience, and fairness to litigants have compelled the federal courts to adopt a powerful preference for referring any remaining state claims to the state courts for adjudication, if the federal causes of action are dismissed. *See, e.g., Gibbs*, 383 U.S. at 726-27; *see also id.* at 726 n.15 (quoting *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949))("Federal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation."). *See also Brandenburg v. Housing Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001) ("In fact, the usual course is for the district court to dismiss the state-law claims without prejudice if all federal claims are disposed of on summary judgment."); *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 546 (7th Cir. 1996)(calling it the "general rule").

The doctrine of pendent jurisdiction, now called supplemental jurisdiction, did not, however, toll the statute of limitations for the pendent state-law claims. The federal courts used a number of creative solutions to address the plaintiffs' predicaments. Some courts required the defendant to waive the state statute of limitations. For

---

[5] *Compare L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc.*, 454 So. 2d 506 (Ala. 1984); *Hauser v. Mealey*, 263 N.W.2d 803 (Minn. 1978); *International Games, Inc. v. Sims*, 444 N.E.2d 736 (1982); *City of Los Angeles v. Superior Court*, 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978).

example, in *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982), the District of Columbia Circuit found that the locally based claim should be dismissed for adjudication in the local courts but not "until the plaintiff has filed an action in the Superior Court of the District of Columbia and the defendant has filed in that court a record of waiver of any applicable statute of limitations." Similar waivers were required in other courts. *See Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985)(opinion by Posner, J.), *cert. denied*, 479 U.S. 816 (1986); *Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D. Cal. 1987); and *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 657 F. Supp. 1037, 1040 (D. Ariz. 1987).

Other courts found the existence of a statute of limitations issue a sufficient reason to retain jurisdiction over a supplemental claim that would otherwise be heard in state court. Then-Judge Breyer, speaking for a panel of the First Circuit, held "that expiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin*, 930 F. 2d 955, 963 (1st Cir. 1991). Although not adopting a hard and fast rule, *Newman* recognized that a number of courts had held that the failure of a district court to exercise jurisdiction over the state law claim was an abuse of discretion when the case faced a state statute-of-limitations problem. *Id.* at 963-64 (citing *L.A. Draper & Son,*, 735 F.2d at 427-30; *Henson*, 651 F.2d at 325; *O'Brien*, 593 F.2d at 65. *See also Beck supra; Edwards, supra.*

Similarly, in a case that had originally been removed to federal court and then was appropriately sent back to state court after the plaintiffs dismissed their federal claim, this Court held that the elapse of the relevant limitations period was "a potent reason for giving federal courts discretion to remand" such claims to keep them alive. *Carnegie-Mellon University*, 484 U.S. at 352. Remand,

however, is not an available option when the case is originally filed in federal court.

A third approach held that federal court reconsideration was mandatory if a state court found the statute of limitations precluded hearing the case. *See Rheaume*, 666 F.2d at 932; *U.S. Industries*, 671 F.2d at 551; *Henson*, 651 F.2d at 325; *McLaughlin*, 410 F. Supp. at 1326.

These solutions were unsatisfactory for a number of reasons. First, the solutions were uncertain, ad hoc and often discretionary, leaving the plaintiff to guess whether a state court would entertain the supplemental claims if his or her federal cause was dismissed or that the federal court would protect the claim. Under these circumstances, counsel would be ill-advised to chance dismissal of all claims in the federal forum, even though his or her client had a right to pursue the case in that forum.

Second, the solutions were unduly complex and eschewed the principle of judicial economy, adding significant additional litigation time and effort to a case while undesirably overtaxing both the parties and the courts. Third, all the solutions entailed a significant invasion of state sovereignty. Required waiver of the limitations period on a case-by-case basis, without congressional authorization, was especially problematic when the defendant, as here, was a political subdivision of the state. Deciding to keep or reconsider dismissal of a case more appropriate to adjudication in state court solely to avoid the limitations problem created serious problems under the doctrine of comity, which this Court has repeatedly described as a "vital consideration." *See, e.g., Younger v. Harris*, 401 U.S. 37, 44 (1971).

Stepping into this breach, Congress enacted section 1367(d) to enable a plaintiff to litigate in federal court without risking that his or her state law claims could be lost

because of a state statute of limitations. The federal interest in resolving this issue is both fundamental and legitimate. This Court has long held that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). This Court has also found that due process assures that a litigant can make his case "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Earlier this year, this Court recognized that a constitutionally based access to court claim exists "to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 122 S.Ct. 2179, 2186 (2002). Read together, these cases establish that a timely lawsuit, properly invoking the jurisdiction of the federal courts, cannot lose its legitimacy and constitutional protection when it is subsequently determined that the case should more properly be tried in state court. Refiling in state court cannot deprive that plaintiff of any ability to seek judicial vindication. Yet, that, unfortunately, is what the South Carolina Supreme Court's decision would do.

In furtherance of considerations of comity and *Marbury's* first duty of government, Congress enacted section 1367(d) so litigants do not have to relinquish their rights of access to the courts because it has made available a federal forum that might later decline to entertain the lawsuit. South Carolina's rejection of Section 1367(d) discriminates against this federal right. *See* discussion pp. 26-27 *infra*.

B. Section 1367(d) Violates Neither the Necessary and Proper Clause nor the Tenth Amendment

The South Carolina Supreme Court misconceived the Necessary and Proper Clause when it declared section 1367(d) violative of it. *Jinks*, 563 S.E.2d 108. The Clause states that "The Congress shall have Power . . .":

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, Sec. 8, cl. 18. The South Carolina Supreme Court conceded that section 1367(d) "is a useful 'aid to the exercise of federal jurisdiction,' and, therefore, is 'necessary.'" *Jinks*, 563 S.E.2d at 107 (citation omitted). However, it found that the tolling provision was not "proper" because it "interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.*

This reading misapprehends the import of the word "proper" and reaches too far. The requirement that a law be "proper" requires that Congress only exercise powers reasonably ancillary to express constitutional authority and not those otherwise prohibited. As a general proposition, "Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)(citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Moreover, this Court has recognized that the Constitution gives Congress "'the necessary resources of flexibility and practicality . . . to perform its function.'" *Yakus v. United States*, 321 U.S. 414, 425 (1944)(citation omitted). These teachings are in accord with Justice Story's Commentaries, which described the Necessary and Proper Clause as removing all uncertainty

about congressional authority to carry out its obligations. 3 Joseph Story, Commentaries on the Constitution § 1238 (1833). The test, Story wrote, is "whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress." *Id.*

The grant of supplemental jurisdiction to the federal courts occasioned by section 1367 was unquestionably within congressional authority to enact. The Necessary and Proper Clause has long been regarded as authorizing Congress to enact appropriate laws that assist the federal courts in executing their Article III duties. Section 1367(d)'s tolling provision does precisely that by limiting the need for federal courts to adjudicate matters more properly heard in state court and by assuring that the possibility of dismissal of the federal cause does not improperly "foreclose some plaintiffs from litigating their state-law claims, [or] . . . chill other plaintiffs from bringing their federal-law claims." *Carnegie-Mellon*, 484 U.S. at 352 n.9.

Nor is this authority otherwise prohibited to Congress. This Court's cases teach that the concerns that animate Tenth Amendment considerations are not rigidly pro-federal nor blindly deferential to "State's Rights." An examination of history reveals

> [t]he Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, 401 U.S. at 44.

In enacting section 1367(d), Congress was sensitive to State interests and did not "unduly interfere with the legitimate activities of the States." Rather than inappropriately invade state sovereignty, as characterized by the South Carolina Supreme Court, section 1367(d) enhances federal judicial recognition of state sovereignty by preventing far more intrusive invasions of that sovereignty through a narrowly tailored and extremely limited solution that accommodates the States' interest in litigating these matters in state courts.

Section 1367(d) merely saves – for a maximum excess period of 30 days – a preexisting lawsuit that must be refiled to allow the matter to be heard in a forum preferable to the State, namely, in its own courts. That constitutionally cognizable preference was expressed by the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.*, which authorizes certain lawsuits against the State or its political subdivisions.[6]

Congress's accommodation of this most basic State interest works no prejudice to other State interests. The function of a statute of limitations, as in this case, is satisfied by the timely filing and prosecution of the action in federal court. It is patently appropriate for the federal courts to entertain such a lawsuit under its supplemental jurisdiction. Thus, an action like that of Petitioner was timely filed and properly raised all the issues that Respondent was obligated to defend under the Tort Claims Act. It cannot now logically

---

[6] Governmental immunity was judicially abolished in South Carolina in 1985. *McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985). The Tort Claims Act was passed by the General Assembly to reestablish some of that immunity. *Jinks*, 563 S.E.2d at 108. The Act makes the State, its agencies, political subdivisions, and other governmental entities "liable for their torts in the same manner and to the same extent as a private individual under like circumstances" with certain limited exceptions. S.C. Code Ann. § 15-78-40.

complain that the movement of that case from federal to state court abrogated their responsibility to respond to the lawsuit.

This Court has noted that statutes of limitations serve a legitimate, but limited purpose. Such statutes

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Railroad Telegraphers, 321 U.S. at 348-49. In that decision, this Court rejected an argument that a state statute of limitations barred a collective bargaining enforcement action brought in federal court after an administrative board had adjudicated the issue. The employer had argued that the state statute of limitations had expired during the pendency of the administrative board hearing. Writing for the Court, Justice Jackson rejected the argument, flatly stating that a "state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." *Id.* at 348.

In reaching that conclusion, this Court noted that the legitimate purposes of the limitations period had been served. Commencement of the administrative action had put the defendant on notice and the continuing nature of the dispute before adjudicatory bodies assured that the claim was not stale and that the evidence remained available. As a practical matter, this Court found "it cannot be said that the claims were not timely pursued. Regrettable as the long

delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed." *Id.* at 349. The logic of the decision has considerable force in Petitioner's case. Her original federal court action, including the supplemental claim, and the refiled action in state court evidences no neglect and still comprises but a single "constitutional case." *Gibbs*, 383 U.S. at 725.

South Carolina law takes a similar view about the purposes and limits of statutes of limitations. Its Supreme Court recently held: "The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy." *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672, 679 (S.C. 2000). The state's caselaw regards the limitations period as serving two fundamental purposes, consistent with teachings of this Court: one purpose "is to relieve the courts 'of the burden of trying claims when a plaintiff has slept on his rights'" and another "is to protect potential defendants from protracted fear of litigation." *Moates v. Bobb*, 470 S.E.2d 402, 404 (S.C. Ct. App. 1996)(quoting *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965))(other citations omitted).

None of those underlying purposes are abridged when, as here, the claim was timely pursued in a federal court, only to be refiled in state court when the federal court determined the case was best tried there. The factors that sometimes outweigh the interest in vindication dissolve entirely in such circumstances. There has been no untimely period of repose and the claims are not stale because the matter has been in litigation for some period of time and was brought within the requisite state-imposed time period.

On that basis, section 1367(d) is a reasonable and rational solution to a real and legitimate problem. It is also clear that Congress conditioned the return of cases to state

courts on the fact that there would be a small 30-day window in which those cases may be reasserted in that forum. *See Hedges*, 204 F.3d at 123. In doing so, Congress was acting on authority derived from Article III to allocate judicial authority to courts inferior to this Court. This Court has found that it is the *"duty* of Congress to pass such laws as [are] necessary and proper to carry into execution the powers vested in the judicial department." *Ableman v. Booth*, 62 U.S. 506, 521-22 (1858)(emphasis added). The congressional enactments are made applicable to the states through the Supremacy Clause, which provides:

> Laws . . . which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2 (emphasis added).

In considering the conjunction between this constitutional command and the Tenth Amendment, this Court recently said:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, see *Printz [v. United States*, 521 U.S. 898,] 935 [(1997)]; *New York [v. United States]*, 505 U.S. [144,] 188 [(1992)], *it may require state courts . . . to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power," Printz, supra,* at 907[].

Alden v. Maine, 527 U.S at 752 (emphasis added).

As an aid to jurisdiction, the tolling provision is "appropriate for the judicial power." The exercise of that power is not a matter in which a State, a political subdivision, or even a private party is "be[ing] forced to entertain in [state] courts suits from which it was immune in federal court." *Howlett v. Rose*, 496 U.S. 356, 365 (1990). It is instead a matter in which the federal court had full authority to hear the case, but has deferred its right to hear the case to the state court in recognition of the State's predominant interest.

C. The Tolling Provision Prevents Discrimination Against a Federal Right

Tenth Amendment concerns surely evaporate when state law discriminates against litigants asserting federal constitutional rights. In *James v. Kentucky*, 466 U.S. 341 (1984), this Court held that a litigant cannot be compelled to comply with state procedural rules so onerous that they unreasonably burden the exercise of those rights. In *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), a state law that penalized an individual for seeking federal judicial redress, with one penalty being forfeiture of any related state law claim against the same defendant, was found unconstitutional.

Last term, this Court noted that

> Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or, as one treatise puts it, they *did not afford* the defendant *"a reasonable opportunity to assert federal rights."* 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure, § 4027, p. 392 (2d ed. 1996)(hereinafter Wright & Miller).

Lee v. Kemna, 534 U.S. 362, 122 S.Ct. 877, 894 (2002). *See also Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952)("State laws are not controlling in determining what the incidents of this federal right shall be."); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) (Holmes, J.)("the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . local practice shall not be allowed to put unreasonable obstacles in the way.").

Here, Congress established a right to take a federal cause of action and a state claim ancillary to it to federal court. It created as well a means by which the federal court could cede responsibility to hear the state matter to state court by tolling the applicable statute of limitations. Congress had such authority and exercised it prudently to recognize both plaintiffs' fundamental due process rights and the rights of the State. Application of a rule that allows defendants to reassert the statute of limitations after the legal contest was timely begun is a "harsh . . . rule" that "is wholly incongruous with the general policy of the Act." *Dice*, 342 U.S. at 362. Section 1362(d) is constitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

Robert S. Peck*
Center for Constitional
Litigation, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2874

BRADFORD P. SIMPSON
SUGGS AND KELLY, P.A.
Post Office Box 8113
Columbia, S.C. 29202
(803) 461-2163

John D. Kassel
Theile Branham
KASSEL LAW FIRM
Post Office Box 1476
Columbia, SC 29202
(803) 256-4242

James Mixon Griffin
SIMMONS AND GRIFFIN, LLC
Post Office Box 5
Columbia, SC 29202
(803) 779-4600

July 18, 2002

*Counsel of Record

Counsel for Petitioners

APPENDICES

Page

A. Opinion of the Supreme Court of South Carolina (April 22, 2002)..... 2a

B. Judgment of Court of Common Pleas, State of South Carolina, County of Richland (November 16, 1999)..... 11a

C. Opinion of the Fourth Circuit Court of Appeals (September 1, 1998)..... 13a

D. Order of the U.S. District Court for the District of South Carolina, Columbia Division (December 1997)..... 21a

E. Opinion of the First Circuit Court of Appeals in *Brown v. City of Boston*, 98 F.3d 1333 (1st. Cir 1996)(table)(per curiam)(unpublished)..... 23a

F. Constitutional and Statutory Provisions Involved..... 26a

A. Opinion of the Supreme Court of South Carolina (April 22, 2002), 563 S.E.2d 104

Supreme Court of South Carolina.

Susan JINKS as Personal Representative of the Estate of Carl H. Jinks,
Respondent,
v.
RICHLAND COUNTY and Dr. Charles Eskridge,
Defendants,
of whom Richland County is Appellant.

No. 25446.

Heard Feb. 20, 2002.
Decided April 22, 2002.

Andrew F. Lindemann, William H. Davidson, II, David L. Morrison, and Alice Price Adams, of Davidson, Morrison and Lindemann, P.A., of Columbia, for appellant.

Bradford P. Simpson, Theile Branham, and John D. Kassel, of Suggs & Kelly Lawyers, P.A.; and James M. Griffin, of Simmons & Griffin, L.L.C., all of Columbia, for respondent.

James E. Parham, Jr., of Irmo, for defendant Dr. Charles Eskridge.

Justice BURNETT:

Respondent Susan Jinks brought this wrongful death and survival action on behalf of her husband, Carl H. Jinks (Jinks and his wife are referred to collectively as "Jinks"), who died while incarcerated at Appellant Richland County's (County's) Detention Center. The jury returned an $80,000 verdict in Jinks' favor for wrongful death. County appeals.

FACTS

On October 14, 1994, Jinks was arrested for failure to pay child support, booked, and confined at County's Detention Center. He died at the Detention Center four days later.

In 1996, Jinks brought an action in the United States District Court against County, its detention center director, and the detention center physician alleging the defendants violated 42 U.S.C. § 1983 (1994). In addition, the complaint alleged supplemental state claims of outrage and negligence under the South Carolina Tort Claims Act (the Tort Claims Act). *See* S.C.Code Ann. §§ 15-78-10 to -200 (Supp.2001). The district court granted the defendants' motions for summary judgment on the Section 1983 claim, [FN1] issued an order declining to exercise jurisdiction over the remaining state claims, and dismissed the state claims without prejudice pursuant to 28 U.S.C.A. § 1367(C)(3) (1993).

FN1. The Court of Appeals affirmed the district court. *Jinks v. McCaulley*, 163 F.3d 598 (4th Cir.1998).

On December 18, 1997, sixteen days after the federal judge issued his order dismissing the state claims, Jinks filed the present wrongful death and survival action alleging various negligent acts by County and its detention center physician. County answered, claiming immunity from suit under the Tort Claims Act, violation of the statute of limitations, collateral estoppel, and other defenses.

ISSUE

Does 28 U.S.C.A. § 1367(d) violate the Tenth Amendment to the United States Constitution?

DISCUSSION

County contends Jinks failed to bring this state court action within the two year statute of limitations provided by the Tort Claims Act and, therefore, the claim is barred. *See* §

15-78-100(a). [FN2] Jinks maintains the statute of limitations was tolled pursuant to 28 U.S.C. § 1367(d) (hereafter referred to as " § 1367(d)") while the original lawsuit was pending in federal court. In response, County asserts in enacting § 1367(d), Congress exceeded its Article III and Necessary and Proper Clause [FN3] powers, thereby violating the Tenth Amendment to the United States Constitution. Specifically, County claims § 1367(d) infringes on South Carolina's sovereign immunity by extending the length of time in which a person may sue a political subdivision of the State on grounds of negligence. We agree with County.

FN2. Jinks filed the current action fourteen months after the statute of limitations expired.

FN3. U.S. Const. art. I, § 8, cl. 18.

In relevant part, 28 U.S.C.A. § 1367 provides:

(a) ... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution....

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

...

(3) the district court has dismissed all claims over which it has original jurisdiction, ...

(d) The period of limitations for any claim asserted under subsection (a) ... shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

....

Section 1367 was adopted as part of the Judicial Improvements Act of 1990. Pub.L. 101-650, 104 Stat. 5089

(1990). "The statute ... gives federal courts supplemental jurisdiction to the limits the case-and-controversy clause of Article III of the [United States] Constitution permits." Charles A. Wright, Arthur R. Miller, Edward H. Cooper, 13 *Federal Practice and Procedure* § 3523.1 at 143 (2d ed. Supp.2001). [FN4]

FN4. Section § 1367 "codified the doctrines of pendent claim, pendent party, and ancillary jurisdiction under the more general label of 'supplemental jurisdiction'." Brian A. Beckcom, Note, *Pushing the Limits of the Judicial Power: Tolling Statutes of Limitations under 28 U.S.C. § 1367(D)*, 77 TEX. L.REV. 1049, 1051 (1999).

The Tenth Amendment provides "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. Const. amend X. "In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

> [W]e ask two questions to determine whether a statute violates [the Tenth Amendment]. First, whether the regulation it embodies is within Congress' power as being within those enumerated in the Constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty.

United States v. Johnson, 114 F.3d 476, 480 (4th Cir.1997), *referring to New York v. United States, supra.*

Article III of the United States Constitution establishes the basis for the judicial power of federal courts. By virtue of

Article III and the Necessary and Proper Clause, Congress has power to enact laws that govern the practice and procedure in federal courts. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965).

The Necessary and Proper Clause, referred to as the "Sweeping Clause," provides that Congress is empowered "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. "[T]he Sweeping Clause is not a self-contained grant of power. It authorizes Congress only to pass laws that 'carry[ ] into Execution' powers the Constitution elsewhere vests in one or more institutions of the federal government." Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Po... -- A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993).

Within the Sweeping Clause, "necessary" does not mean absolutely required but "convenient, or useful, or essential to another." *McCulloch v. Maryland*, 4 Wheat. 316, 413, 17 U.S. 316, 4 L.Ed. 579 (1819). In order for a law to be "proper" within the meaning of the Clause, it must not violate the principles of state sovereignty. *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

County maintains § 1367(d) is neither necessary nor proper. First, County asserts since the tolling provision does not apply until after the federal action is dismissed, the statute is not "necessary" to federal practice and procedure. Second, County argues § 1367(d) is not "proper" because it interferes with a state's sovereignty by abrogating the statute of limitations. More particularly, County claims Congress lacks the constitutional authority to extend the statute of limitations governing actions in which the State has waived its sovereign immunity.

County correctly asserts § 1367(d) regulates state court

practice and procedure as it tolls the statute of limitations for a state claim asserted in state court. However, the tolling provision also affects federal practice as it allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis is determined not to exist. It governs federal practice and procedure as it eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court. [FN5] Section 1367(d) is a useful "aid to the exercise of federal jurisdiction," and, therefore, is "necessary" within the meaning of the Necessary and Proper Clause. Brief for Petitioner at 27, *Raygor v. Regents of the Univ. of Minnesota*, 2001 WL 913842 (Case No. 00- 1514).

> FN5. *See* Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute--A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 983 (1992) (discussing pre- § 1367(d) approaches in determining propriety of discretionary dismissal of a supplemental claim).

We conclude, however, that, as applied to the States and their political subdivisions in tort actions, passage of § 1367(d) is not "proper" within the meaning of the Necessary and Proper Clause. In these circumstances, the tolling provision interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit.

> [T]he constitution of the United States, which recognizes and preserves the autonomy and independence of the states,--independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

As a matter of sovereignty, the State has the authority to determine *whether* it consents to suit within its own court system. *Alden v. Maine*, 527 U.S. 706, 749, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) ("... the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."); *Nevada v. Hall*, 440 U.S. 410, 414, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) ("[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of [its] immunity" from suit). In addition, the State has the authority to determine the *conditions* under which it consents to suit. *Alden v. Maine, supra* (suggesting state's waiver of immunity is limited to the parameters set forth by the state statute); *Beers v. Arkansas*, 20 How. 527, 529, 61 U.S. 527, 15 L.Ed. 991 (1857) (because waiver of sovereign immunity is "altogether voluntary," "it follows that [the State] may prescribe the terms and conditions on which [the State] consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires."). Most recently, the United States Supreme Court recognized that "although we have not addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, we can say that the notion at least raises serious constitutional doubt." *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, ----, 122 S.Ct. 999, 1006, 152 L.Ed.2d 27, 38 (2002); *see Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949) (federal court "cannot give [state claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action.").

Under the doctrine of sovereign immunity, governmental entities in South Carolina were protected from suits alleging

tortious conduct by their employees until 1985. *Town of Duncan v. State Budget and Control Bd.*, 326 S.C. 6, 482 S.E.2d 768 (1997). In that year, the Court abolished the sovereign immunity of the State and all local governmental subdivisions. *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). In response, the General Assembly enacted the Tort Claims Act, reinstating sovereign immunity for the State and its political subdivisions with certain exceptions. § 15-78-20. The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions. *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 444 S.E.2d 498 (1994); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *see* § 15-78-40 (the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances" subject to certain limitations and exemptions in the Tort Claims Act). One of the conditions is that an action must be brought within two years of the date of loss. § 15-78-100(a).

Section 1367(d) potentially exposes political subdivisions to litigation and liability after the limitations period established by the State has expired. Accordingly, in tort actions against political subdivisions, § 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause. *Lynn v. City of Jackson*, 63 S.W.3d 332 (Tenn.2001) (§ 1367(d) cannot extend statute of limitations in governmental tort claim actions in which State has consented to being sued without abrogating doctrine of sovereign immunity).

As a practical matter, we recognize our decision may affect a plaintiff's decision to pursue a tort action against a political subdivision in federal court. We conclude, however, that a party's ability to choose its forum should not prevail over the State's sovereign authority to establish the terms under

which its political subdivisions may be sued. Furthermore, our decision does not limit a plaintiff's ability to prosecute one action joining all federal and state law claims. Should a plaintiff fear the federal court system will be unable to determine her claims within the statute of limitations, she may bring the action in state court.

In summary, Congress exceeded its constitutional authority in enacting § 1367(d) to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions. Consequently, we conclude the tolling provision does not apply in these circumstances. *See Raygor v. Regents of Univ. of Minnesota, supra* (§ 1367(d) does not apply to dismissals of claims against nonconsenting States dismissed in federal court on Eleventh Amendment grounds). Accordingly, § 1367(d) did not toll Jinks' tort action against County. Since her complaint was not filed within the two year statute of limitations provided by the Tort Claims Act, her negligence claim against County is barred as untimely. The trial judge erred in holding otherwise. [FN6]

> FN6. In light of our disposition of this issue, it is unnecessary for us to address County's remaining arguments.

REVERSED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

563 S.E.2d 104 (S.C. 2002).

B. Judgment of Court of Common Pleas, State of South Carolina, County of Richland (November 16, 1999)

State of South Carolina — Judgment in a Civil Case
County of Richland

In the Court of Common Pleas — Case No. 97-CP-40-4456

Susan Jinks	Richland County et al.
PLAINTIFF(S)	DEFENDANT(S)

CHECK ONE:

[x] **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] **ACTION DISMISSED (*CHECK REASON*):** [ ]Rule 12(b), SCRCP; [ ]Rule 41(a), SCRCP (Vol. I Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ]Other- _____

[ ] **ACTION STRICKEN (*CHECK REASON*):** [ ]Rule 40(j) SCRCP; [ ]Bankruptcy; [ ]Other-_____

IT IS ORDERED AND ADJUDGED: [ ]See attached order; [ ]Statement of Judgment by the Court;

> Verdict for Plaintiff in the amount of $80,000 against Richland County.

Dated at COLUMBIA, South Carolina, this 12th day of Nov 1999.

L. Henry McKellar /s/
PRESIDING JUDGE

This judgment was entered on the 16th day of November 1999 and a copy mailed first class this ____ day of _____, 19___ to attorneys of record or to parties (when appearing pro se) follows:

James M. Griffin	William H. Davidson
_____	Aiice Adams
_____	David Morrison
_____	_____
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)

Barbara A. Scott
CLERK OF COURT

C. Opinion of the Fourth Circuit Court of Appeals (September 1, 1998)(unpublished), 163 F.3d 598

United States Court of Appeals, Fourth Circuit.

Susan JINKS, individually and as personal representative of the Estate of Carl H. Jinks, Plaintiff-Appellant,
v.
James McCAULEY; Richland County, South Carolina; Charles Eskridge, Doctor, Defendants-Appellees,
and
Richland County Detention Center; Gurney Bell; Jane Roe; John Doe, Defendants.

No. 98-1003.

Sept. 1, 1998.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Matthew J. Perry, Jr., Senior District Judge. (CA-96-1650-3)

James M. Griffin, SIMMONS, GRIFFIN & LYDON, L.L.P., Columbia, South Carolina; Bradford P. Simpson, SIMPSON, DONG & WINGATE, L.L.P., Columbia, South Carolina, for Appellant.

William H. Davidson, II, Andrew F. Lindemann, DAVIDSON, MORRISON & LINDEMANN, P.A., Columbia, South Carolina; James E. Parham, Jr., Columbia, South Carolina, for Appellees.

Before NIEMEYER, HAMILTON, and LUTTIG, Circuit Judges.

OPINION

PER CURIAM.

Appellant Susan Jinks ("Susan") appeals the district court's grant of summary judgment to Appellees in her 42 U.S.C. § 1983 (1994) action. Finding no error in the district court's decision to grant summary judgment to Appellees, we affirm.

Susan's suit against Appellees--Richland County, South Carolina ("Richland County"), James McCauley ("McCauley"), and Dr. Charles Eskridge ("Eskridge")-- arose out of the death of her husband Carl H. Jinks ("Carl"), which occurred while he was a prisoner in the Richland County Detention Center (the "jail"). Suing as personal representative of Carl's estate, Susan alleged that Appellees violated Carl's Eighth Amendment right to be free from cruel and unusual punishment and that those violations resulted in Carl's death. These allegations were based on the following facts.

On October 14, 1994, a South Carolina judge found Carl in contempt of court for nonpayment of $1500 in child support and sentenced Carl to confinement in jail pending payment. Carl, who had been "booked" into the jail that morning, informed the court that he was an alcoholic, that he was experiencing withdrawal from alcohol, and that he wished to be placed in a treatment center rather than jail. The court informed Carl that it could not order him to be confined to a treatment center and that he would have to ask to see a physician at the jail before anything could be done for him.

Nothing in the record indicates that Carl asked to see a physician once he returned to the jail. However, approximately three days later, on October 17, a guard at the jail observed Carl clutching the bars of his cell while shaking, sweating profusely, smiling, and laughing. Although Carl did not request medical care, the guard

reported the situation to his supervisor, who escorted Carl to Eskridge, a private physician under contract to provide medical services to the jail.

Eskridge examined Carl and determined that he was suffering from Stage II alcohol withdrawal. Eskridge prescribed the drug Librium, which is used to treat the symptoms of alcohol withdrawal, ordered Carl to be kept under observation, and scheduled a "follow-up" visit for the next day. According to his testimony in the district court, Eskridge did not feel that Carl's situation was urgent, [FN1] and therefore he did not direct jail officials to begin administering the drug to Carl immediately. Instead, Eskridge acted with the knowledge that the Librium would be ordered from a private pharmacy and delivered to the jail the next morning, at which time Carl could begin taking it. [FN2]

The record discloses that officials at the jail followed Eskridge's orders. Guards periodically checked on Carl, and at approximately 6:30 a.m. on October 18, they noticed that Carl had gotten down from his bunk and was sleeping on the floor. They continued to check on Carl, and at approximately 9:30 a.m., they observed Carl sitting upright in the cell. [FN3] According to one of the guards, Carl was no longer sweating, shaking, laughing, or smiling. [FN4] However, while guards were placing two other inmates in the cell with Carl at 10:30 a.m., the guards discovered that Carl was dead.

Susan commenced this action in June 1996. In her complaint, she asserted several different allegations regarding Appellees. First, she alleged that Richland County violated Carl's Eighth Amendment rights by maintaining a policy or custom of inadequate medical care for inmates in the jail. Second, she alleged that Richland County's policy or custom of ordering prescriptions for inmates to be delivered the next day violated Carl's Eighth Amendment rights. Third, she alleged that Richland County violated Carl's

Eighth Amendment rights by failing to implement a detoxification policy in the jail, by failing to require guards to document their carrying out of a physician's orders, and by allowing overcrowding at the jail. Fourth, Susan alleged that James McCauley, Director of the jail, violated Carl's Eighth Amendment rights by permitting these conditions to exist in the jail. Finally, Susan alleged that Eskridge violated Carl's Eighth Amendment rights by providing negligent care and treatment that resulted in Carl's death.

After discovery, Appellees moved for summary judgment. Finding that Susan presented no triable issues of fact on any of her claims, the district court granted that motion in November 1997. This appeal followed.

We review the district court's grant of summary judgment de novo [FN5] and affirm its decision in its entirety. First, the district court determined that Susan's claim that Richland County violated Carl's Eighth Amendment rights by maintaining a policy or custom of inadequate medical care for inmates in the jail did not meet the requirements we established for such a claim in *Spell v. McDaniel.* [FN6] In *Spell,* we stated that a viable claim of municipal liability under 42 U.S.C. § 1983 can only arise "'when execution of a government's policy or custom'" results in the injury alleged. [FN7] In addition, we held that the execution of a policy or custom that is not unconstitutional on its face must be more than merely negligent. Rather, it must be at least deliberately indifferent to or undertaken with reckless disregard for the constitutional rights of the person who was allegedly injured. [FN8]

Here, we agree with the district court's conclusion that, "[e]ven viewed in the light most favorable to [Susan], the evidence in the record does not demonstrate that the conduct of Richland County rose to the level of deliberate indifference or reckless disregard, nor does it demonstrate the 'persistent and widespread' practice [of the policy or custom] required to invoke . . . municipal liability." [FN9] In

attempting to prove that the "policy or custom" that allegedly resulted in Carl's death was "widespread," Susan introduced only the testimony of Linda Byrd ("Byrd"), who had worked as a nurse in the jail. However, Byrd's testimony never touched on the gravamen of Susan's first allegation against Richland County--that it did not provide medical care for inmates by following physicians' orders. Rather, Byrd's testimony was only that inmates were not being seen at times by physicians, [FN10] which is undisputably not the case here.

In addition, as Byrd's testimony focused only on the practices of medical personnel other than Eskridge, we agree with the district court's conclusion that it was insufficient to show any causal connection between the allegedly widespread policy or custom and Carl's death. Further, as the district court also found, even if Byrd's testimony pertained to the substance of Susan's first allegation and offered evidence of a causal connection between that allegation and Carl's death, there is nothing in Byrd's testimony that indicates that the problems she described were "'so permanent and well-settled as to [have] the force of law,'" [FN11] and thus, represented actionable policies or customs.

Therefore, we agree with the district court's conclusion that Susan failed to offer any evidence that might support a finding of liability on the part of Richland County in this regard. Accordingly, we affirm the district court's grant of summary judgment on this allegation.

We also affirm the district court's grant of summary judgment to Richland County on Susan's claim that the County's policy of ordering medication for the jail to be delivered the next day was deliberately indifferent to or undertaken with reckless disregard for the constitutional rights of prisoners. As the district court noted, it is undisputed that it was Eskridge who decided that Carl did not need to begin taking Librium immediately. Had

Eskridge decided otherwise, the jail presumably could have obtained the prescription quicker. However, as jail officials are generally entitled to rely on a physician's decision regarding care for a prisoner, [FN12] there was no policy or custom that caused Carl's death. Rather, if Carl's death can be attributed to the fact that he did not begin taking Librium on October 17, then the only person who could be held liable in this regard is Eskridge, who, in his professional judgment, determined that Carl could wait until the next day to begin receiving the drug. As we discuss below, such potential malpractice is not actionable under § 1983.

With regard to Susan's allegation that Richland County should be held liable for the failure of McCauley, the jail's director, to implement certain detoxification and medical treatment policies and to ease the problem of overcrowding at the jail, we agree with the district court's conclusion that Susan has offered no evidence that "any of these proposed policies would have prevented Carl Jinks['s] death, [or that they were] constitutionally required." [FN13] As the district court concluded, this allegation is largely speculative and makes virtually no appeal to any standards that might form the basis for an action under § 1983. In fact, as the district court noted, the only standards to which Susan appeals are South Carolina state standards, [FN14] which, as standards grounded in state law, cannot form the basis for an allegation that federal constitutional rights were violated under color of state law. [FN15] Therefore, we affirm the district court's grant of summary judgment on this allegation.

We also affirm the district court's finding that Susan presented no triable issue of fact regarding supervisory liability on McCauley's part. To be subject to supervisory liability under § 1983, it must be shown that: (1) McCauley had actual or constructive knowledge of the allegedly unconstitutional actions; (2) McCauley tacitly approved of or was deliberately indifferent to those actions; and (3) that there was an affirmative causal link between McCauley's

failure to correct the situation and the injury alleged. [FN16]

However, as we have found that Susan failed to present any evidence regarding the existence of unconstitutional actions in the jail, we need not address the question of whether McCauley can be subject to supervisory liability for those alleged actions. Accordingly, we affirm the district court's grant of summary judgment to McCauley on this allegation.

Finally, we decline to disturb the district court's grant of summary judgment to Eskridge on Susan's allegation that Eskridge violated Carl's Eighth Amendment rights by providing negligent care and treatment that resulted in Carl's death. This issue was not specifically discussed in the district court's memorandum. However, alleged medical malpractice does not rise to the level of a constitutional violation simply because the victim is a prisoner. [FN17] With this principle in mind, we find no triable issues in Susan's allegations in this regard. Accordingly, we agree with the district court's conclusion that summary judgment was warranted on this allegation.

For these reasons, we affirm the district court's order granting summary judgment in its entirety. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid the decisional process.

AFFIRMED

FN1. J.A. at 405.

FN2. *Id.*

FN3. *Id.* at 103.

FN4. *Id.* at 104.

FN5. *See M & M Med. Supplies v. Pleasant Valley Hosp.,*

981 F.2d 160, 163 (4th Cir.1992).

FN6. 824 F.2d 1380 (4th Cir.1987).

FN7. *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir.1987) (quoting *Monell v. Department of Soc. Servs. of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

FN8. *See id.* at 1390-91.

FN9. J.A. at 780 (quoting *Spell*, 824 F.2d at 1386).

FN10. *Id.* at 516.

FN11. *Spell*, 824 F.2d at 1386 (quoting *Monell*, 436 U.S. at 691) (internal citation omitted).
FN12. *See Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir.1990).

FN13. J.A. at 783 (citations omitted).

FN14. Appellant's Br. at 24.

FN15. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

FN16. *See Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir.1994) (citations omitted).

FN17. *See Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

163 F.3d 598 (Table)(4th Cir.(S.C.)), Unpublished Disposition

D. Order of the U.S. District Court for the District of South Carolina, Columbia Division (December 1997)

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Susan Jinks, Individually and Susan Jinks as Personal Representative of the Estate of Carl H. Jinks,	)Case No.: 3:96-1650-10
Plaintiff,	)ORDER
vs.	
James McCauley, Richland County, Gurnie Bell, Jane Doe, John Doe and Dr. Charles Eskridge,	
Defendants.	

This Court previously entered an Order on November 20, 1997, granting summary judgment to the Defendants James McCauley, Richland County, and Dr. Charles Eskridge only as to the federal claims brought pursuant to Title 42, U.S.C. § 1983. The two separate November 20, 1997, Orders did not address Plaintiff's pendent State claims. Since all federal claims in this action have been resolved, this Court declines

to exercise jurisdiction over the remaining state claims pursuant to United Mine Workers v. Gibbs, 383 U.S. 715 (1996).

Therefore, this Court hereby dismisses Plaintiff's pendent State claims without prejudice pursuant to 28 U.S.C. § 1367 (C)(3).

IT IS SO ORDERED.___

Hon. Matthew J. Perry /s/
The Honorable Matthew J. Perry
Senior U.S. District Judge

Columbia, South Carolina

December 3, 1997

E. Opinion of the First Circuit Court of Appeals in *Brown v. City of Boston*, 98 F.3d 1333 (1st. Cir 1996)(table)(per curiam)(unpublished), 98 F.3d 1333

United States Court of Appeals, First Circuit.
Barry BROWN, Plaintiff, Appellant,
v.
CITY of Boston, et al., Defendants, Appellees.
No. 96-1074.
Oct. 15, 1996.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Edward F. Harrington, U.S. District Judge]

D.Mass.
AFFIRMED.
Elliott Fine and Elliott Fine and Associates on brief for appellant.

John M. Townsend, General Counsel, Joan T. Kennedy, Assistant General Counsel, Merita A. Hopkins, Corporation Counsel, and Kevin S. McDermott, Assistant Corporation Counsel, on brief for appellees.

Before TORRUELLA, Chief Judge BOUDIN and LYNCH, Circuit Judges.

PER CURIAM.
Upon careful review of the briefs and record, it clearly appears that this appeal presents no substantial question, and we perceive no reason to reverse the judgment from which plaintiff appeals.
Specifically, we agree with the district court that plaintiff's allegations of negligence were insufficient to state a federal claim. See Daniels v. Williams, 474 U.S. 327, 331-33 (1986) (no constitutional due process claim was stated against prison officials for "negligent failure to protect"); Manarite v.

City of Springfield, 957 F.2d 953, 957-59 (1st Cir.) (dismissing s 1983 claims where police did not act with "deliberate indifference"), cert. denied, 506 U.S. 837 (1992). Even plaintiff's sketchy claim of harassment by the prison staff was grounded in the same insufficient allegations of negligence underlying the rest of his complaint. On that basis, the district court properly determined that defendants were entitled to judgment on any federal claims.

The district court also properly determined that it would not exercise pendent jurisdiction over any remaining state claims, once the federal claims were dismissed. See 28 U.S.C. s 1367(c)(3) (district court may decline supplemental jurisdiction if it has dismissed all claims over which it has original jurisdiction); Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988) (district court has discretion to retain or dismiss the remaining state claims, upon consideration of factors such as comity, judicial economy, convenience, and fairness); Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 257 (1st Cir.1996) (same). No abuse of that discretion is apparent here. Although plaintiff may have preferred a remand to the state court, in light of the tolling provision of 28 U.S.C. s 1367(d), he was not harmed by the dismissal. See Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267 (D.C.Cir.1995) (s 1367(d) tolls the state statute of limitations on any state claim over which a federal court has exercised supplemental jurisdiction until 30 days after its dismissal and thus reduces the concern that plaintiffs would lose their claims if their case were dismissed). We note that, while this appeal was pending (and without following the procedure set forth in Puerto Rico v. SS Zoe Colocotroni, 601 F.2d 39, 42 (1st Cir.1979)), plaintiff asked the district court to vacate the judgment of dismissal and remand the case to the state court. Plaintiff apparently believed that the statute of limitations had expired on his dismissed state law claims and that he could not refile them in state court. By orders dated July 16, 1996, the district court granted plaintiff's motions and remanded the case. Defendants have moved for reconsideration or clarification of those orders, but the district court has not yet

acted on that motion. In other words, the district court has purported to vacate the very judgment that is now before us on appeal.

For the purpose of this appeal, we consider the July 16, 1996, orders to be nullities. See Toscano v. Chandris, 934 F.2d 383, 387 (1st Cir.1991) (giving no effect to orders entered without compliance with the Colocotroni procedure; "[i]f courts did not demand that litigants recognize and respect jurisdictional borders, the judicial system would be adrift in a sea of competing decrees and duplicative proceedings"). Once our mandate issues, however, the district court may act on plaintiff's post-judgment motions and defendants' motion for reconsideration. Should either party desire to appeal from any such subsequent rulings, a separate notice of appeal must be filed. The judgment appealed from is affirmed, and appellees' motion to be heard at oral argument is denied.

98 F.3d 1333 (Table)(1st Cir.(Mass.)),
Unpublished Disposition

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Necessary and Proper Clause, the Supremacy Clause, the Third Article, the Fifth Amendment, the Tenth Amendment, and the Fourteenth Amendment to the United States Constitution are reproduced below.

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art I, cl. 18.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

U.S. CONST. art VI, cl. 2.

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good

> Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend X.

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

28 U.S.C. § 1367. Supplemental jurisdiction is reproduced below.

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be

inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1367.

The relevant provisions of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001) are reproduced below.

> SECTION 15-78-40. Tort liability of State, agency, political subdivision, or governmental entity, generally.
>
> The State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.

S.C. Code Ann. § 15-78-40.

> SECTION 15-78-110. Statute of limitations.
>
> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

S.C. Code Ann. § 15-78-110.

Supreme Court, U.S.
FILED
SEP 19 2002
OFFICE OF THE CLERK

No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

ANDREW F. LINDEMANN
Counsel of Record
WILLIAM H. DAVIDSON, II
DAVID L. MORRISON
DAVIDSON, MORRISON AND
LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, SC 29202
(803) 806-8222

Attorneys for Respondent

176310

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Cited Authorities	ii
Statement of the Case	1
Reasons for Denying the Petition	2
I. The decision of the South Carolina Supreme Court is a natural and logical extension of this Court's recent holding in *Raygor v. Regents of the University of Minnesota*.	2
II. The Petitioner disregards the ultimate issue as to whether Congress had the authority to toll a state law statute of limitations as applied to States and political subdivisions and instead focuses on the benefits of 28 U.S.C. § 1367(d).	4
III. The decision of the South Carolina Supreme Court does not conflict with any prior decisions of this Court, any federal court of appeals, or any state courts of last resort.	7
IV. The decision of the South Carolina Supreme Court is restricted to the facts presented in this case and cannot be read to bar any federal law that imposes a stay on state court proceedings or tolls a state law statute of limitations.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Blinn v. Florida Department of Transportation, 781 So. 2d 1103 (Fla. Ct. App. 2000) 8

Block v. North Dakota, 461 U.S. 273 (1983) 5

Estate of Fennell v. Stephenson, 137 N.C. App. 430, 528 S.E.2d 911 (2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (2001) 8

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6

Jinks v. McCaulley, 163 F.3d 598 (1998) 1

Printz v. United States, 521 U.S. 898 (1999) 5, 6

Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002) ..... *passim*

Regents of the University of Minnesota v. Raygor, 620 N.W.2d 680 (Minn. 2001), *aff'd on other grounds*, 534 U.S. 533 (2002) 8

United States Constitution:

U.S. Const. amend. X 3, 6

U.S. Const. amend. XI 3

Cited Authorities

Page

Statutes:

28 U.S.C. § 1367(d) ..... *passim*

42 U.S.C. § 1983 1

S.C. Code Ann. § 15-78-10, *et seq.* 5

S.C. Code Ann. § 15-78-100(a) 2, 5

STATEMENT OF THE CASE

The Petitioner, Susan Jinks, as the Personal Representative of the Estate of Carl Jinks, brought a survival action and a wrongful death action against Richland County and Dr. Charles Eskridge. The claims arise out of the death of Carl Jinks on October 18, 1994, while incarcerated at the Richland County Detention Center.

The Petitioner originally commenced an action in United States District Court asserting federal constitutional claims under 42 U.S.C. § 1983 and supplemental state law claims. Richland County and other defendants filed motions for summary judgment in that action. By order entered on November 20, 1997, United States District Judge Matthew J. Perry granted summary judgment for Richland County on the federal constitutional claims. An order dismissing the supplemental state law claims without prejudice was entered on December 3, 1997. Jinks then appealed to the Fourth Circuit Court of Appeals which affirmed the district court's rulings. *Jinks v. McCaulley*, 163 F.3d 598 (1998) (table).

Following the dismissal of the supplemental state claims and while the federal appeal was pending, the Petitioner filed an action in the Court of Common Pleas for Richland County. That action was filed on December 19, 1997, which was less than thirty days after the dismissal of the supplemental state law claims in the district court.

Following discovery, the case proceeded to trial before Judge L. Henry McKellar and a jury commencing on November 8, 1999. At the close of the cases-in-chief, the Respondent County moved for a directed verdict. Those motions were denied. The jury ultimately returned a defense

verdict on the survival action for both defendants. The jury returned a defense verdict on the wrongful death action for Dr. Charles Eskridge. However, the jury returned a verdict of $80,000 actual damages in favor of the Petitioner and against Richland County on the wrongful death action. The Respondent thereafter filed post-trial motions, including a motion for judgment notwithstanding the verdict based upon a statute of limitations defense. Those motions were also denied by the trial judge.

An appeal was filed to the South Carolina Court of Appeals. The appeal was then certified for immediate review by the South Carolina Supreme Court. By its decision issued April 22, 2002, the South Carolina Supreme Court reversed the trial court and ruled that the Petitioner's negligence claim was barred by the two-year statute of limitations under the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-100(a). The court concluded that the tolling provision set forth in 28 U.S.C. § 1367(d) as applied to a political subdivision such as Richland County was unconstitutional.

REASONS FOR DENYING THE PETITION

I. The decision of the South Carolina Supreme Court is a natural and logical extension of this Court's recent holding in *Raygor v. Regents of the University of Minnesota*.

The South Carolina Supreme Court ruled that the federal tolling statute, 28 U.S.C. § 1367(d), is in violation of the Tenth Amendment as applicable to a political subdivision of the State of South Carolina. In ruling on the Respondent's Tenth Amendment challenge, the South Carolina Supreme Court analyzed the source and scope of congressional

authority and concluded that "Congress exceeded its constitutional authority in enacting § 1367(d) to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002). (Pet. App. A at10a).

The Petitioner seeks a writ of certiorari to review this holding that § 1367(d) violates the Tenth Amendment as applied to a political subdivision. However, a writ of certiorari is not necessary under these circumstances given this Court's decision last term in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002). In *Raygor*, this Court entertained an Eleventh Amendment challenge to § 1367(d), and based upon rules of statutory construction, this Court ruled that the statute does not apply to nonconsenting States. Importantly, this Court in *Raygor* recognized that:

> [W]ith respect to suits against a state sovereign in its own courts, we have explained that a State "may prescribe the terms and conditions on which it consents to be sued," and that "[o]nly the sovereign's own consent could qualify the absolute character of [its] immunity" from suit in its own courts. Thus, although we have not directly addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, we can say that the notion at least raises a *serious constitutional doubt*.

534 U.S. at __, 122 S. Ct. at 1006. (Citations omitted) (Emphasis added).

In *Jinks*, the South Carolina Supreme Court relied on the *Raygor* decision and, in fact, explained that the *Raygor* Court found that the issue presented by the County's appeal raised "serious constitutional doubt." Ultimately, the decision below applies and gives fruition to the analysis employed by this Court in *Raygor*. In essence, the decision below is the natural and logical extension of the holding set forth in *Raygor*. For this reason, it is unnecessary for this Court to grant a writ of certiorari in the present case. A denial of certiorari when read in combination with the decision in *Raygor* will sufficiently place the bar and bench on notice that § 1367(d) is inapplicable to both States and political subdivisions.

II. The Petitioner disregards the ultimate issue as to whether Congress had the authority to toll a state law statute of limitations as applied to States and political subdivisions and instead focuses on the benefits of 28 U.S.C. § 1367(d).

Like the dissent in *Raygor*, the Petitioner attempts to shift the focus from the constitutionality of the statute to its utility. The Petitioner argues the many perceived benefits of § 1367(d) to the orderly operation of the federal courts. The Petitioner further asserts that other federal statutes containing tolling provisions may also be unconstitutional if the decision below is allowed to stand. Yet, the issue is not whether tolling provisions such as § 1367(d) serve a beneficial purpose. Instead, the issue is whether Congress had the authority to toll a state law statute of limitations where the defendant is a State or a political subdivision. Simply because a statute may have a beneficial purpose or have some rational basis does not mean that Congress had the authority to enact the law.

In her petition for writ of certiorari, the Petitioner does not address with any specificity the question raised by her petition — whether Congress was authorized under Article III and the Necessary and Proper Clause to enact § 1367(d) and apply the tolling provision to governmental entities which enjoy sovereign immunity. The ruling on that question by the South Carolina Supreme Court, as foreshadowed by this Court's decision in *Raygor*, was a correct one.

The Petitioner ignores the authority cited in *Raygor* holding that a State may place restrictions on the waiver of sovereign immunity, including a statute of limitations. *See Block v. North Dakota*, 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity"). In South Carolina, the enactment of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, reinstated sovereign immunity with certain exceptions. As the South Carolina Supreme Court explained in its decision, the waiver of sovereign immunity is limited by a two-year statute of limitations. *See* S.C. Code Ann. § 15-78-100(a). Thus, sovereign immunity is not waived unless a suit is filed within the prescribed limitations period. In the present case, the state court action was filed long after the two-year statute of limitations had expired, and as a result, the Respondent enjoyed sovereign immunity from suit.

Thus, the effect of applying § 1367(d) to a South Carolina governmental entity such as Richland County in the case at bar was to enlarge the State's waiver of sovereign immunity. Under the reasoning of *Block* and *Raygor*, that alone constitutes impermissible interference with state sovereignty. In *Printz v. United States*, 521 U.S. 898 (1999), this Court

held that a law is not "proper" under the Necessary and Proper Clause where it "violates the principle of state sovereignty." 521 U.S. at 924. Thus, the South Carolina Supreme Court correctly ruled that Article III and the Necessary and Proper Clause are not a proper source for congressional power to toll a state law statute of limitations as applied to a State or political subdivision.

At the very least, the application of § 1367(d) affects the constitutional balance between States and the Federal government. In *Raygor*, this Court explained:

> [A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity.

534 U.S. at __, 122 S. Ct. at 1006. This Court applied the clear statement principle of statutory construction to determine whether Congress even intended to alter the state-federal balance so as to apply § 1367(d) to a State or political subdivision. This Court concluded that "§ 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States." 534 U.S. at __, 122 S. Ct. at 1007. Likewise, it may be said that § 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against any political subdivision, such as Richland County. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991) (adopting plain statement rule with respect to statutory ambiguity that implicates Tenth Amendment concerns).

Apparently recognizing that *Raygor* would compel an affirmance in this case,[1] the Petitioner argues in this Court for the first time that the decision by the South Carolina Supreme Court constitutes a violation of due process or at least impedes a litigant's right of access to a federal forum. *See*, Petition, pp. 15-19. In this same vein, the Petitioner argues that the decision by the South Carolina Supreme Court somehow discriminates against litigants asserting federal constitutional rights. *See* Petition, pp. 26-27. Nonetheless, these arguments cannot and do not override the absence of congressional authority to interfere with the exercise of state sovereignty by applying § 1367(d) to a State and its political subdivisions.

III. The decision of the South Carolina Supreme Court does not conflict with any prior decisions of this Court, any federal court of appeals, or any state courts of last resort.

The decision of the South Carolina Supreme Court in this case does not conflict with a decision of another state court of last resort nor a decision of a United States court of appeals nor a decision of this Court. To the contrary, the decision below is consistent with the decision of the United States Supreme Court in *Raygor*, *supra*. Furthermore, no decision of a United States court of appeals has ever addressed the constitutionality of § 1367(d).[2] Finally, the only

1. Remarkably, the Petitioner does not discuss nor even cite to this Court's decision in *Raygor* in her petition for writ of certiorari.

2. No federal court of appeals will likely have the opportunity to address this issue because the federal tolling provision is never applied in federal court cases. In fact, the Petitioner has not and cannot (Cont'd)

state court of last resort to address the constitutionality of § 1367(d) is the Minnesota Supreme Court which found the statute to be unconstitutional. *Regents of the University of Minnesota v. Raygor*, 620 N.W.2d 680 (Minn. 2001), *aff'd on other grounds*, 534 U.S. 533 (2002).[3]

IV. The decision of the South Carolina Supreme Court is restricted to the facts presented in this case and cannot be read to bar any federal law that imposes a stay on state court proceedings or tolls a state law statute of limitations.

The Petitioner suggests that the decision below, if allowed to stand, will override any federal law that imposes a stay on state court proceedings or tolls a state law statute of limitations. This suggestion is erroneous for two primary reasons.

(Cont'd)
cite a single federal court case where § 1367(d) is applied to toll a state statute of limitations. The tolling provision is applied only in state law cases pending in state courts. That is truly illustrative of the fact that § 1367(d) is a federal statute applicable only to state courts.

3. The constitutionality of § 1367(d) has been upheld in two state court cases; however, those cases were decided by intermediate state appellate courts. *See Blinn v. Florida Department of Transportation*, 781 So. 2d 1103 (Fla. Ct. App 2000) (review of this issue was not sought in Florida Supreme Court); *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (2001) (North Carolina Supreme Court did not address constitutionality of § 1367(d)). Neither case includes a particularly detailed or thoughtful analysis of the complex constitutional issues raised. A more persuasive and better reasoned analysis, albeit succinct, is contained in the dissent in *Blinn*.

First, the South Carolina Supreme Court restricted its holding in *Jinks* to the factual circumstances presented. The court ruled that Congress exceeded its authority in enacting § 1367(d) only "to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions." *Jinks*, 563 S.E.2d at 108. (Pet. App. A at10a). The court concluded that "the tolling provision does not apply in these circumstances." *Id*. The *Jinks* opinion cannot be read as a broad ruling declaring § 1367(d) unconstitutional in all circumstances and as applied to all defendants, governmental and non-governmental alike. Moreover, the *Jinks* opinion cannot be read as limiting the ability of Congress to legislate a stay of state court proceedings in the varied contexts raised by the Petitioner.

Second, the South Carolina Supreme Court has held only that Congress lacked the authority under Article III and the Necessary and Proper Clause to toll the statute of limitations applicable to a state law claim against Richland County. The *Jinks* court did not decide nor even suggest that Congress lacks authority to provide for the tolling of a statute of limitations in other contexts such as the Soldiers' and Sailors' Civil Relief Act or the Y2K Act. It is possible that authority exists under Article I for those tolling provisions.

The Respondent, therefore, disagrees with the Petitioner's suggestion that this case "presents an issue of great federal importance with ramifications for a wide variety of statutes." *See* Petition, p. 12. To the contrary, this appeal presents an issue largely decided in *Raygor*. As stated, this case represents an anticipated and logical extension of the *Raygor* holding. *Raygor* holds that the tolling provision set

forth in § 1367(d) does not apply to States, and under a similar rationale, the court below extended that holding to political subdivisions.

CONCLUSION

For the foregoing reasons, the Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ANDREW F. LINDEMANN
Counsel of Record
WILLIAM H. DAVIDSON, II
DAVID L. MORRISON
DAVIDSON, MORRISON AND
LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, SC 29202
(803) 806-8222

Attorneys for Respondent

Supreme Court, U.S.
FILED
DEC 5 2002
OFFICE OF THE CLERK

No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF ON THE MERITS FOR PETITIONER

BRADFORD P. SIMPSON
SUGGS AND KELLY, P.A.
Post Office Box 8113
Columbia, S.C. 29202
(803) 461-2163

JOHN D. KASSEL
THEILE BRANHAM
KASSEL LAW FIRM
Post Office Box 1476
Columbia, S.C. 29202
(803) 256-4242

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2874

JAMES MIXON GRIFFIN
SIMMONS AND GRIFFIN, L.L.C.
Post Office Box 5
Columbia, S.C. 29202
(803) 779-4600

*Counsel of Record

Counsel for Petitioner

59 pp

QUESTION PRESENTED

The federal supplemental jurisdiction statute includes a provision, 28 U.S.C. § 1367 (d), that tolls the period of limitations for supplemental claims while they are pending in federal court and for 30 days after they are dismissed. The question presented is whether the tolling provision invades state sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause.

PARTIES TO THE PROCEEDINGS

Petitioner is Susan Jinks. Respondent is Richland County.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 4
ARGUMENT 7
I. ENACTMENT OF THE TOLLING PROVISION IS WITHIN CONGRESS'S CONSTITUTIONAL AUTHORITY 8
A. Respect for Federalism Required a Tolling Provision 8
B. Congress Enacted the Tolling Provision Based on Its Article III Authority 18
C. The Necessary and Proper Clause Supports Congressional Authority under Article III 24
II. SECTION 1367(D) DOES NOT VIOLATE THE TENTH AMENDMENT 29
III. THE TOLLING PROVISION PREVENTS DISCRIMINATION AGAINST A FEDERAL RIGHT 41
CONCLUSION 47

TABLE OF AUTHORITIES

CASES

Ableman v. Booth, 62 U.S. 506 (1858) 19
Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 21
Alden v. Maine, 527 U.S. 706 (1999) 3, 31
American National Red Cross v. S.G., 505 U.S. 247 (1992) 20
Armstrong v. Manzo, 380 U.S. 545 (1965) 43
Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993) 22
Beck v. Prupis, 162 F.3d 1067 (11th Cir. 1998) 14, 18
Board of Comm'rs v. United States, 308 U.S. 343 (1939) 36
Bowen v. City of New York, 476 U.S. 467 (1986) 24
Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891 (6th Cir. 2001) 12
Brewer v. City of El Cerrito, 666 F. Supp. 1346 (N.D. Cal. 1987) 13
Brickley v. United States (In re Brickley), 70 B.R. 113 (9th Cir. BAP 1986) 22
Brown v. City of Boston, 98 F.3d 1333, 1996 WL 590553 (1st Cir. 1996) 18
Brown v. Western R. Co., 338 U.S. 294 (1949) 27
Burnett v. Grattan, 468 U.S. 42 (1984) 45
Burnett v. New York Cent. R., 380 U.S. 424 (1965) 35, 38, 39
Burns-Toole v. Byrne, 11 F.3d 1270 (5th Cir.), *cert. denied*, 512 U.S. 1207 (1994) 16
Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 12, 15, 16, 33
Carr v. CIGNA Sec., Inc., 95 F.3d 544 (7th Cir. 1996) 12
Christopher v. Harbury, 122 S. Ct. 2179 (2002) 43
City of Chicago v. International College of Surgeons, 522 U.S. 156 (1998) 12, 33
City of Los Angeles v. Superior Court, 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978) 13
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 32

Conroy v. Aniskoff, 507 U.S. 511 (1993) 21
Cook, Perkiss & Liehe v. Northern California Collection Service, Inc., 911 F.2d 242 (9th Cir. 1990) 12
Davis v. Wechsler, 263 U.S. 22 (1923) 44
Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001) 24
DelCostello v. Teamsters, 462 U.S. 151 (1983) 40, 45
Dice v. Akron, Canton & Youngstown R. Co., 342 U.S. 359 (1952) 44, 46
Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) 13
Edmondson & Gallagher v. Alban Towers Tenant Ass'n, 48 F.3d 1260 (D.C. Cir. 1995) 16
Felder v. Casey, 487 U.S. 131 (1988) 27, 28, 29, 42
Financial General Bankshares, Inc. v. Metzger, 680 F.2d 768 (D.C. Cir. 1982) 13
Finley v. United States, 490 U.S. 545 (1989) 4, 8, 10
Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) 17
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 40, 41
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 25, 31
Graham v. John Deere Co., 383 U.S. 1 (1966) 25
Gregory v. Ashcroft, 501 U.S. 452 (1991) 20
Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945) 24, 34
Hanger v. Abbott, 73 U.S. (6 Wall.) 532 (1867) 38
Hanna v. Plumer, 380 U.S. 460 (1965) 26, 29
Harkins Amusement Enterprises, Inc. v. Harry Nace Co., 657 F. Supp. 1037 (D. Ariz. 1987) 14
Harris v. Nelson, 394 U.S. 286 (1969) 15, 20
Hauser v. Mealey, 263 N.W.2d 803 (Minn. 1978) 13
Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000) 18
Henson v. Columbus Bank and Trust Co., 651 F.2d 320 (5th Cir. 1981) 14, 15
Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n, 362 S.E.2d 176 (S.C. 1987) 13
Hines v. Davidowitz, 312 U.S. 52 (1941) 42
Honda v. Clark, 386 U.S. 484 (1967) 24
Howlett v. Rose, 496 U.S. 356 (1990) 31

In re Broughton, 49 B.R. 312 (Bankr. N.D. Ill. 1985) *aff'd*, 60 B.R. 373 (N.D. Ill. 1986).....22
In re DiCamillo, 186 B.R. 59 (E.D. Pa. 1995).....22
In re Murchison, 349 U.S. 133 (1955).....43
In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195 (2d Cir. 1987).....14
Independent Union of Flight Attendants v. Pan American World Airways, Inc., 966 F.2d 457 (9th Cir. 1992).....22
International Games, Inc. v. Sims, 444 N.E.2d 736 (1982).....13
James v. Kentucky, 466 U.S. 341 (1984).....41
Jinks v. McCaulley, 163 F.3d 598 (4th Cir. 1998).....2, 3
Jinks v. Richland County, 563 S.E.2d 104 (S.C. 2002).....*passim*
Konrad v. South Carolina Electric and Gas Co., 308 S.C. 167, 417 S.E.2d 557 (S.C. 1992).....40
L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc., 454 So. 2d 506 (Ala. 1984).....13
L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc., 735 F.2d 414, 427-30 (11th 1984.....14
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991).....45
Lee v. Kemna, 534 U.S. 362 (2002).....44
Lockerty v. Phillips, 319 U.S. 182 (1943).....19
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....43
Mathews v. Eldridge, 424 U.S. 319 (1976).....43
McLaughlin v. Campbell, 410 F. Supp. 1321 (D. Mass. 1986).....15
Moates v. Bobb, 470 S.E.2d 402 (S.C. Ct. App. 1996).....35
Monell v. Department of Social Services, 436 U.S. 658 (1978).....26
Moriarty v. Garden Sanctuary Church of God, 534 S.E.2d 672 (S.C. 2000).....35, 36
Naragon v. Dayton Power Light Co., 934 F. Supp. 899 (S.D. Ohio 1996).....18
Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967).....42

Neal v. District of Columbia, 131 F.3d 172 (D.C. Cir. 1997).....18
Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) 23
New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492 (3d Cir. 1996).....31
New York v. United States, 505 U.S. 144 (1992).....29, 30
Newman v. Burgin, 930 F. 2d 955 (1st Cir. 1991) 14
Noble v. White, 996 F.2d 797 (5th Cir. 1993).....31
North Star Steel Co. v. Thomas, 515 U.S. 29 (1995).....40
O'Brien v. Continental Ill. Nat'l Bank and Trust Co., 593 F.2d 54 (7th Cir. 1979).....14
O'Connor v. Commonwealth Gas Co., 251 F.3d 262 (1st Cir. 2001) 12
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944).....37, 38
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 19, 20
Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947)..39
Pallazola v. Rucker, 621 F. Supp. 764 (D. Mass. 1985)...14
Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580 (5th Cir. 1992).....12
Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982).....42
Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (Ariz. 1942).....21
Price v. Johnson, 334 U.S. 266 (1948) 20
Printz v. United States, 521 U.S. 898 (1997)..15, 31, 32, 44
Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1966)....11
Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949) 34
Rheaume v. Texas Dep't of Public Safety, 666 F.2d 925 (5th Cir. 1982).....15
Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168 (1st Cir. 1995) 12
Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999)...13
Seabrook v. Jacobson, 153 F.3d 70 (2d Cir. 1998) 18
Seniority Research Group v. Chrysler Motor Corp., 976 F.2d 1185 (8th Cir. 1992).....34
Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995).....31, 46

Strachman v. Palmer, 177 F.2d 427 (1st Cir. 1949) 12
Testa v. Katt, 330 U.S. 386 (1947) 44
Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940) 22
U.S. Industries, Inc. v. Blake Construction Co., 671 F.2d 539, 551 (D.C. Cir. 1981) 15
United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 12, 18, 28, 33
United States v. Johnson, 114 F.3d 476 (4th Cir. 1997) .. 29
Van Heest v. Veech, 58 N.J. Super. 427, 156 A.2d 301 (N.J. Co. Ct. 1959) 21
Verlinden B.V. v. Bank of Nigeria, 461 U.S. 480 (1983) .. 19
Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 35
Wilson v. Garcia, 471 U.S. 261 (1985) 46
Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998) 33
Wood v. DeWeese, 305 F. Supp. 939 (W.D. Ky. 1969) 23
Yakus v. United States, 321 U.S. 414 (1944) 25
Younger v. Harris, 401 U.S. 37 (1971) 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. X ..... *passim*
U.S. Const. amend. XIV 46
U.S. Const. Art. I, Sec. 8, cl. 18 ..... *passim*
U.S. Const. Art. III ..... *passim*
U.S. Const. Art. VI, cl. 2 ..... 6, 30

STATUTES

11 U.S.C. § 108(c). 22
11 U.S.C. § 362 22
11 U.S.C. § 362(a) 21
28 U.S.C. § 1367 ..... *passim*
28 U.S.C. § 1367(a) 8
28 U.S.C. § 1367(b) 8, 10
28 U.S.C. § 1367(c). ..... *passim*
28 U.S.C. § 1367(d). ..... *passim*
42 U.S.C. § 1983 ..... 2, 26, 27, 42

All Writs Act, 28 U.S.C. § 1651(a) 5, 20, 21
Anti-Injunction Act, 28 U.S.C. § 2283 ..... 5, 21
Civil Rights Act of 1871, 28 U.S.C. § 1983 46
Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 23
Federal Courts Committee Study Implementation Act of 1990 10
Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) 10
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525 21
South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001). 2, 28
Stay Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864). . 21
Y2K Act, 15 U.S.C. § 6606(e)(4) 23

OTHER AUTHORITIES

ALI, Study of the Division of Jurisdiction Between State and Federal Courts ix (1969) 10
The Federalist (C. Rossiter ed. 1961) ..... *passim*
H.R. REPT. NO. 101-734, 101st Cong., 2d Sess. (1990), *reprinted in*, 1990 U.S.C.C.A.N. 6860 ..... 11, 17
Madison, James, Writings (J. Rakove ed., 1999) 41
Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35 (2001) 19
Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855 (1998) 17
Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513 (2002) 41
REPORT OF THE FEDERAL COURTS STUDY COMM. (1990) 10
Rowe, *et al.*, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991) 9

S. REPT. NO. 101-416, 101st Cong., 2d Sess. *reprinted in* 1990 U.S.C.C.A.N. 6801 ..... 11, 42
Story, Joseph, Commentaries on the Constitution § 1238 (1833) 26
Wechsler, Herbert, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216 (1948) 9
Wright, et al., Federal Practice and Procedure (Supp. 2002) 13, 44

No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF ON THE MERITS FOR PEITIONER

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. A, 2a-10a) is reported at 349 S.C. 298, 563 S.E.2d 104. The judgment of the South Carolina Court of Common Pleas (Pet. App. B, 11a-12a) is unreported. The opinion of the U.S. Court of Appeals for the Fourth Circuit (Pet. App. C, 13a-20a) is reported at 163 F.3d 598 (table)(per curiam)(unpublished). The Order of the United States District Court for South Carolina (Pet. App. D, 21a-22a) is unpublished.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on April 22, 2002. The petition for a writ of certiorari was filed on July 18, 2002, and was granted on October 21, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set out in the Appendix to the Petition for Certiorari (Pet. App. F, 26a-30a).

STATEMENT OF THE CASE

Carl H. Jinks died of complications associated with alcohol withdrawal on October 18, 1994 at Respondent Richland County's Detention Center within four days of his arrest for failure to pay $1500 in child support. *Jinks v. Richland County*, 349 S.C. 298, 301, 563 S.E.2d 104, 105 (S.C. 2002). At the time of arrest, Respondent was put on notice that Jinks was suffering from alcohol withdrawal, a diagnosis confirmed by subsequent examination by Dr. Charles Eskridge, the detention center physician, who wrote a prescription for Jinks that was never administered. *See Jinks v. McCaulley,* 163 F.3d 598 (4th Cir. 1998)(table)(per curiam)(unpublished), Pet. App. C, at 13a [hereinafter "*McCaulley*"].

In 1996, within the applicable state statute of limitations, Petitioner Susan Jinks brought an action against the county and its physician-employee in the United States District Court for the District of South Carolina, raising claims under 42 U.S.C. § 1983 and supplemental claims for wrongful death and survival under the South Carolina Tort Claims Act, S.C. CODE ANN. §§ 15-78-10 *et seq.* (Supp. 2001). *Jinks*, 349 S.C. at

301, 563 S.E.2d at 105. On November 20, 1997, the district court granted defendants' motions for summary judgment on the Section 1983 claim. *Id.* On December 3, 1997, the court issued an order declining to exercise jurisdiction over the remaining state claims and dismissed the state claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *Id.* The Fourth Circuit subsequently affirmed the district court's rulings. *McCaulley,* 163 F.3d 598 (4th Cir. 1998)(table).

On December 18, 1997, sixteen days after the district court dismissed her action and while the federal appeal was pending, Petitioner filed a wrongful death and survival action in the Court of Common Pleas for Richland County. *Jinks*, 349 S.C. at 301, 563 S.E.2d at 105. Her filing was well within the 30-day tolling period provided by 28 U.S.C. § 1367(d). After trial, a jury returned a verdict of $80,000 in actual damages in favor of Petitioner and against Richland County in the wrongful death action. It returned defense verdicts on the wrongful death action for Dr. Eskridge and on the survival action for both defendants. *Id.* After denial of its post-trial motions, Richland County appealed to the South Carolina Supreme Court. *Id.*

That court held 28 U.S.C. § 1367(d) unconstitutional, reasoning that it interferes "with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause." *Id.* at 108. In reaching that conclusion, the state Supreme Court held that, although the tolling provision was "necessary" as a useful aid to federal jurisdiction, it was not "'proper' within the meaning of the Necessary and Proper Clause. . . . [because it] interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.* at 107. Further, citing this Court's decision in *Alden v. Maine,* 527 U.S. 706, 749 (1999), the state Supreme Court declared that "the State has the authority to determine *whether* it

consents to suit within its own court system." 563 S.E.2d at 107 (emphasis in original). It then found that such consent exists only to the extent permitted by the state Tort Claims Act. *Id.* at 108. The court further held that, by extending the time period for waiver of sovereign immunity of the state's political subdivisions, § 1367(d) exercised an attribute of state sovereignty, in violation of the Tenth Amendment. *Id.*

SUMMARY OF ARGUMENT

1. South Carolina's Supreme Court invalidated the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. 1367, on Tenth Amendment grounds. It did so based in the mistaken belief that the limitations period had not already been satisfied and that a statute of limitations is an attribute of sovereignty that can never be overridden by federal law. The decision wrongly gives short shrift to the ample constitutional authority that supports the federal tolling requirement.

In enacting § 1367 at the invitation of this Court, *Finley v. United States*, 490 U.S. 545, 556 (1989), Congress exercised power granted by Article III of the Constitution to allocate judicial authority to courts inferior to this Court. It wrote § 1367 to guarantee plaintiffs a federal forum capable of deciding all claims arising from the same nucleus of operative facts as one that confers original federal jurisdiction. By doing so, it embraced state claims that otherwise have no federal nexus. Sensitive to the jurisprudential preference that state issues be decided in state courts, Congress also provided district courts with the authority to decline jurisdiction over the state claims once the federal cause of action had fallen away. To assure that a litigant's access to justice was not abridged by that action, Congress mandated that such dismissals be without prejudice and created a *de minimis* tolling period of 30 days in which

the plaintiff could refile in state court if the limitations period had expired.

The tolling provision was an integral part of the statute. Without it, experience indicated that district courts would not cede authority over supplemental jurisdiction claims that otherwise belonged in state court, would demand waivers of the limitations period from defendants as the price of dismissal, or would grant a motion for reconsideration when the state court refused to hear the action. Tolling, thus, accommodated the interests of comity by enabling the district courts to send the case for resolution in state courts.

In enacting the tolling provision, Congress acted in aid of federal jurisdiction, as it had done previously on a number of occasions. For example, Congress passed a tolling statute during the Civil War to enable plaintiffs to bring actions that the closing of courts had prevented. Today, tolling laws protect members of the armed forces even in times of peace from losing their claims during both foreign and stateside military service, protect claimants during the pendency of an automatic stay during bankruptcy proceedings, protect plaintiffs with Year 2000-related claims during the mandatory notice and remediation period set by federal law, and protect plaintiffs suing under state law over hazardous environmental release exposure. In addition, courts are invested with authority to stay limitations periods in aid of jurisdiction under the All Writs Act and the Anti-Injunction Act, as well as through the doctrine of equitable tolling. By including a tolling provision in the supplemental jurisdiction statute, Congress went down a well-trod path within its Article III authority, as informed by the Necessary and Proper Clause.

2. In holding that the relevant statute of limitations was an attribute of sovereignty that cannot be invaded by the federal government, the South Carolina Supreme

Court ignored the import of the Supremacy Clause. The Supremacy Clause explicitly acknowledges federal authority over state courts. It mandates that state tribunals enforce federal law. Federal supremacy carves out an exception to the reservation of State rights represented by the Tenth Amendment that specifically overrides state court prerogatives. It thus imposes a constitutional duty to protect the rights of parties under federal law and eliminate unnecessary burdens. Tolling fits into this rubric because its only impact is felt in state courts. It does not change the underlying statute of limitations or litigants' rights.

Equally important, the State's interest in its limitations period is fully met by the federal supplementary jurisdiction scheme set up by the statute. First, plaintiffs must comply with the state limitations to confer the initial federal jurisdiction. By doing so, the State's interest in protecting defendants from stale claims and preserving evidence is fully met. When that limitations period expires during the pendency of the federal action and the forum court determines that the remaining issues are better heard in state court, no prejudice is worked against the State's interests or that of the defendant. The *de minimis* 30-day window created by the tolling provision does not change the timeliness of the claims and does not render the claim suddenly stale. If the district court had decided to retain jurisdiction, the matter would have been heard there in the same timeframe. Refiling in state court does not change the character of the case. Nonsuiting the plaintiff wrongly interferes with the implementation of valid national policies. It would suggest that a wide variety of other federal statutes and other exercises of federal judicial authority that stay state court proceedings are invalid and renders the Supremacy Clause a nullity.

3. State law may not penalize a person for pursuing federal rights. Here, Congress provided claimants with a

right to adjudicate related federal and state claims in federal court, while accommodating federalism interests by providing a mechanism to return to state court cases that have developed into purely state-law contests. South Carolina would treat the pursuit of this right in federal court differently than the same bundle of claims filed in state court. Such a result amounts to a form of palpable discrimination against federal rights.

Access to justice is a constitutional value second to none. When Congress appropriately provides a federal forum to a claimant, a determination to cede that authority to state courts with concurrent jurisdiction must include a reasonable opportunity to assert all the remaining claims that comprised the single constitutional case in federal court. When a state limitations period operates to foreclose the presentation of a claim authorized by federal law, the Constitution requires that the more suitable period contained in federal law prevail.

This Court should uphold § 1367 (d) and reverse the judgment of the South Carolina Supreme Court.

ARGUMENT

In enacting the supplemental jurisdiction statute, 28 U.S.C. § 1367, Congress demonstrated a due respect for both federalism and the values it represents. It understood that only by tolling the state limitations period could federal courts dismiss an action more appropriate to the state courts. Without such tolling, district courts will not decline jurisdiction over state law claims even after federal claims were dismissed. Misreading the Constitution's commands, the Supreme Court of South Carolina declared this well-grounded attempt to accommodate federalism interests unconstitutional.

I. Enactment of the Tolling Provision Is within Congress's Constitutional Authority

Congress enacted the supplemental jurisdiction statute, 28 U.S.C. § 1367, after this Court ruled that a district court could not exercise pendent jurisdiction without statutory authorization. *Finley v. United States,* 490 U.S. 545 (1989). In accepting this Court's invitation to enact such a law, Congress included the tolling provision, 28 U.S.C. § 1367(d), as an integral part of the statute, because Congress considered it to be essential to honoring the principles of federalism by minimizing federal intrusion into matters best resolved in state court. Rather than abridge state rights, as the South Carolina Supreme Court found below, the tolling provision enhances respect for federalism.

A. Respect for Federalism Required a Tolling Provision

The supplemental jurisdiction statute provides, with certain limitations, that "district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. §1367(a).

Although Subsection (a) asserts the full measure of possible federal judicial authority over state-based claims, the remaining subsections demonstrate a discriminating sensitivity to State interests. Subsection (b) places limits on supplemental jurisdiction in cases premised solely on diversity of citizenship. 28 U.S.C. § 1367 (b). Subsection (c) authorizes district courts to "decline to exercise supplemental jurisdiction" so the matter may be heard in state court, if

> (1) the claim raises a novel or complex issue of State law,
> (2) the [state-based] claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. 1367(c).

Subsection (d) tolls the limitations period for any supplemental claim dismissed under subsection (c) and for any other claims voluntarily dismissed. The tolling window created lasts only 30 days after dismissal without prejudice from district court, unless state law provides a longer tolling period. 28 U.S.C. § 1367(d).

The academic advisors to Congress on § 1367 noted that the statute was needed to fill "a widening chasm in the jurisdictional authority of the federal courts." Rowe, *et al., Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction,* 74 JUDICATURE 213, 213 (1991). Scholars, legal institutions, and courts recognized the absence of a tolling provision as a significant obstacle to satisfactory federal-state court relations. As early as 1948, Professor Herbert Wechsler recommended the addition of a tolling provision in any statutory resolution of the issues surrounding supplemental jurisdiction. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROBS. 216, 233 (1948).

The American Law Institute (ALI) took up the issue after Chief Justice Earl Warren told it that "a proper

jurisdictional balance between the federal and state court systems, assigning to each system those cases most appropriate in light of the basic principles of federalism" was needed. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS ix (1969)(quoting Chief Justice Earl Warren, Opening Address to the 36th Annual Meeting of the ALI (May 1959)). Subsequently, the ALI proposed that the state limitations period be tolled while a supplemental jurisdiction case is pending in federal court, in order to encourage the return of purely state issues to state court. Section 1386(b) of the ALI proposal would have tolled the state limitations period by "an action timely commenced in federal court." *Id.* at 65. The ALI argued that such a provision was necessary "as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available." *Id.* at 453.

After *Finley*, the Federal Courts Study Committee recommended enactment of a supplemental jurisdiction law that included a tolling provision, noting that "[a]bolishing or radically curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from the federal courts, but this is a situation in which it is unwise to do so." REPORT OF THE FEDERAL COURTS STUDY COMM. 47-48 (1990).

Congress chose to enact only what it deemed the "noncontroversial" recommendations[1] of the study committee in The Federal Courts Committee Study Implementation Act of 1990, which became Title III of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5104 (1990). That Act was passed to promote "the just, speedy and inexpensive resolution of civil disputes" and enhance citizens' access to the courts.

[1] 136 Cong. Rec. H13313 (Oct. 27, 1990) (remarks of sponsor, Rep. Kastenmaier).

S. REPT. NO. 101-416, 101st Cong., 2d Sess., at 1, *reprinted in* 1990 U.S.C.C.A.N. 6801, 6804. Section 310 of the 1990 Act contained the supplemental jurisdiction law now found at 28 U.S.C. 1367.

Congress sought to accomplish two fundamental purposes in enacting § 1367. First, it provided a federal forum for cases in which it was appropriate to invoke original federal jurisdiction but that also involved state law claims arising from the same nucleus of operative facts. The House Report, which provides the principal legislative history, states that § 1367, "by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction." H.R. REPT. NO. 101-734, 101st Cong., 2d Sess., at 28 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 6860, 6874.

Second, Congress intended to honor the age-old preference that state courts should decide state issues. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1966)(noting "important countervailing interest[s]" that justify deference to state courts, including "considerations of proper constitutional adjudication, regard for federal-state relations, [and] wise judicial administration."). To accommodate State interests, Congress incorporated standards into the law to encourage appropriate federal discharge of an action in favor of state courts and tolled state limitations periods for 30 days to facilitate resumption of the litigation in state court when the federal claims have fallen away.

By adopting the pre-*Finley* jurisprudence on supplemental jurisdiction, Congress endorsed this Court's instruction to federal courts considering whether to hear a state-based cause of action after the federal claim has ended to "consider and weigh in each case, and at every

stage of the litigation, the values of judicial economy, convenience, fairness and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims." *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 173 (1998)(quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988)).

Accepting this encouragement, federal courts generally dismissed state supplemental claims so that they might be heard more appropriately in state court. *See, e.g., O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262, 272 (1st Cir. 2001); *Brandenburg v. Housing Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001); *Carr v. CIGNA Sec., Inc.*, 95 F.3d 544, 546 (7th Cir. 1996)(calling it the "general rule"); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992); *Cook, Perkiss & Liehe v. Northern California Collection Service, Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). *See also United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27, 726 n.15 (1966) (quoting *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949)("Federal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation.").

Still, courts considered expiration of the state limitations period a "salient factor" advising against dismissal. *O'Connor*, 251 F.3d at 273 (citing *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1177 (1st Cir. 1995)). Thus, enactment of the tolling provision addressed a palpable dilemma faced by plaintiffs with both federal and state claims.

Often, a plaintiff had no way out of this dilemma other than to eschew his or her right to bring the action in federal court. Claim preclusion required plaintiffs seeking vindication of their rights in federal court to include the state claims that arise from the same nucleus of facts in their federal lawsuit. *See generally* 18 Wright,

et al., Federal Practice and Procedure at § 4412, at 287 (Supp. 2002). *See also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)(acknowledging the issue preclusive effect of § 1367 jurisdiction). South Carolina, like most states, mandates that a "litigant is barred from raising any issues where were adjudicated in the former suit and *any issues which might have been raised in the former suit.*" *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n*, 362 S.E.2d 176, 177 (S.C. 1987)(emphasis added). *Compare L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc.*, 454 So. 2d 506 (Ala. 1984); *Hauser v. Mealey*, 263 N.W.2d 803 (Minn. 1978); *International Games, Inc. v. Sims*, 444 N.E.2d 736 (Ill. App. 3d Dist. 1982); *City of Los Angeles v. Superior Court*, 149 Cal. Rptr. 320, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978). A plaintiff could not risk filing in federal court and losing the state claim because the limitations period was not tolled.

To prevent that scenario, federal courts felt compelled to devise a variety of ad hoc, stopgap, and often inconsistent approaches. Some courts required the defendant to waive the state statute of limitations. For example, in *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982), the District of Columbia Circuit found that the locally based claim should be dismissed to allow adjudication in the local courts but not "until the plaintiff has filed an action in the Superior Court of the District of Columbia and the defendant has filed in that court a record of waiver of any applicable statute of limitations." Similar waivers were required in other courts. *See Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985)(opinion by Posner, J.), *cert. denied*, 479 U.S. 816 (1986); *Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D. Cal. 1987); and *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 657 F.

Supp. 1037, 1040 (D. Ariz. 1987) .[2] In a variation on this theme, Judge Keeton deferred decision on dismissal until the state court had determined whether the statute of limitations would bar the claim in state court. *Pallazola v. Rucker*, 621 F. Supp. 764, 770-71 (D. Mass. 1985).

Under a second approach, courts found the existence of a statute of limitations issue a sufficient reason to retain jurisdiction over a supplemental claim that would otherwise be heard in state court. Then-Judge Breyer, speaking for a panel of the First Circuit, held "that expiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin*, 930 F. 2d 955, 963 (1st Cir. 1991). Although not adopting a hard and fast rule, *Newman* recognized that a number of courts had held that the failure of a district court to exercise jurisdiction over the state law claim was an abuse of discretion when the case faced a state limitations problem. *Id.* at 963-64 (citing *L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 427-30 (11th 1984); *Henson v. Columbus Bank and Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981); *O'Brien v. Continental Ill. Nat'l Bank and Trust Co.*, 593 F.2d 54, 65 (7th Cir. 1979). *See also Beck v. Prupis*, 162 F.3d 1067, 1100 (11th Cir. 1998)(collecting cases indicating that elapse of limitations period mandates retention of case).

Similarly, in a case that had originally been removed to federal court and then was appropriately sent back to state court after the plaintiffs dismissed their federal claim, this Court held that the elapse of the relevant limitations period was "a potent reason for giving federal courts discretion to remand" such claims to keep

[2] Courts have generally required waiver of the limitations period "where the foreign court would not provide an adequate alternative in the absence of such a condition." *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 203-04 (2d Cir. 1987).

them alive. *Cohill*, 484 U.S. at 352. Remand, however, is not an available option when the case is originally filed in federal court.

A third approach held that federal court reconsideration was mandatory if a state court found the statute of limitations precluded hearing the case. The Fifth Circuit, for example, instructed that "if the district court determines that the pendant claim should be dismissed by the federal court and [the plaintiff] later discovers that his case is time barred in the state court, *the federal district court should grant a motion for reconsideration* of whether or not the federal court will exercise its pendent jurisdiction to hear the state law claim." *Rheaume v. Texas Dep't of Public Safety*, 666 F.2d 925, 932 (5th Cir. 1982)(emphasis added). *See also U.S. Industries, Inc. v. Blake Construction Co.*, 671 F.2d 539, 551 (D.C. Cir. 1981); *Henson*, 651 F.2d at 325; *McLaughlin v. Campbell*, 410 F. Supp. 1321, 1326 (D. Mass. 1986).

These makeshift solutions were unsatisfactory for a number of reasons. Foremost among them, all the solutions invaded state sovereignty to some degree. Required waiver of the limitations period on a case-by-case basis, without congressional authorization, was especially problematic when the defendant, as here, was a political subdivision of the state, for it commandeered a non-judicial state officer's acceptance of a federal mandate; namely, waiver of the limitations period. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997). Moreover, deciding to keep or reconsider dismissal of a case more appropriate to adjudication in state court solely to avoid the limitations problem created serious problems under the doctrine of comity, which this Court has repeatedly described as a "vital consideration." *See, e.g., Younger v. Harris*, 401 U.S. 37, 44 (1971).

The solutions were also uncertain, ad hoc and often discretionary, leaving the plaintiff to guess whether a state court would entertain the supplemental claims if his or her federal cause was dismissed. When they would not, federal courts would not always protect the claim by keeping the case. For example, in *Burns-Toole v. Byrne,* 11 F.3d 1270 (5th Cir.), *cert. denied,* 512 U.S. 1207 (1994), the Fifth Circuit refused to disturb the discretion of the district court in dismissing all claims, federal and state, and found the fact "that the statute of limitations has run on [plaintiff's] state law claims hardly dictates a result which we, in the interest of justice, cannot countenance." *Id.* at 1276.

Under such circumstances, counsel would be ill-advised to chance dismissal of all claims in the federal forum, even though his or her client had a federal right to pursue the case in that forum. The tolling provision thus addresses this dilemma, which this Court recognized may "foreclose some plaintiffs from litigating their state-law claims, [or] . . . chill other plaintiffs from bringing their federal-law claims." *Cohill,* 484 U.S. at 352 n.9. *See also Edmondson & Gallagher v. Alban Towers Tenant Ass'n,* 48 F.3d 1260, 1267 (D.C. Cir. 1995)(§ 1367(d) "reduces one concern expressed in [*Cohill*] – that plaintiffs would lose their claims if their case were dismissed rather than remanded.").

Finally, the solutions were unduly complex and at odds with the principle of judicial economy, adding significant additional litigation time and effort to a case while undesirably overtaxing both the parties and the courts. The inconsistent treatment of cases involving supplemental jurisdiction ill served the fair administration of justice.

Congress saw tolling as a solution to these issues. The House Report states that the tolling provision's

> purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive for such a gap in tolling where a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

H.R. REPT. NO. 101-734, at 30 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 6860, 6876.

Tolling enables federal courts to let the supplemental claim go to state court, fostering a greater adherence to the key values of federalism. It makes subsection (c), which details the federalism-sensitive reasons for a court to decline supplemental jurisdiction, effective.

Professor John Oakley, reporter for the ALI's Federal Judicial Code Revision Project, confirms this pro-federalism understanding of the tolling provision's purpose: "Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling." Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project,* 31 U.C. DAVIS L. REV. 855, 945 (1998).

Experience demonstrates that § 1367(d) has had its intended effect. Its very existence has encouraged federal appellate courts to mandate that district courts "dismiss the pendent state claim without prejudice and . . . toll the period of limitations." *Franklin v. Zain,* 152 F.3d 783, 786 (8th Cir. 1998). In other instances, circuit courts have

found no abuse of discretion when a district court has dismissed the action without prejudice *because* § 1367(d)'s tolling provision saved the right to go to state court despite the expiration of the limitations period. *See Hedges v. Musco,* 204 F.3d 109, 123-24 (3d Cir. 2000); *Seabrook v. Jacobson,* 153 F.3d 70, 72 (2d Cir. 1998); *Beck,* 162 F.3d at 1099; *Neal v. District of Columbia,* 131 F.3d 172, 175 n.5 (D.C. Cir. 1997); *Brown v. City of Boston,* 98 F.3d 1333, 1996 WL 590553, *1 (1st Cir. 1996)(unpublished)(Pet. App. E, 23a). Moreover, at least one district court has held that the tolling provision permits it to dismiss, rather than remand, cases that have been removed to federal court. *See Naragon v. Dayton Power Light Co.,* 934 F. Supp. 899 (S.D. Ohio 1996).

If this Court agrees with the South Carolina Supreme Court, it will also reverse the admonition this Court issued in *Gibbs* that the disposition of supplemental claim is a "doctrine of discretion, not of plaintiff's right," *Gibbs,* 383 U.S. at 726 (footnote omitted). Without a state court option, access to justice considerations will compel the retention of the state claim in federal court. Such a result will also add to the docket of an already overtaxed federal court system and downgrade considerations of comity that might otherwise recommend that these cases are more appropriately heard in state court. It may also force plaintiffs to forego their right to bring their actions initially in federal court, for fear of losing their state claim altogether.

B. Congress Enacted the Tolling Provision Based on Its Article III Authority

In enacting the supplemental jurisdiction statute, Congress exercised its authority under Article III to allocate judicial authority to courts inferior to this Court. U.S. Const. Art. III, § 1. The Constitution contemplates that it is the "*duty* of Congress to pass such laws as [are] necessary and proper to carry into execution the powers

vested in the judicial department." *Ableman v. Booth,* 62 U.S. 506, 521-22 (1858)(emphasis added). This congressional authority spans enormous breath. *See Lockerty v. Phillips,* 319 U.S. 182, 187 (1943)(citations omitted)("The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good'.").

The Framers anticipated that federal courts would exercise supplemental jurisdiction-like authority. For example, Alexander Hamilton noted that the "judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." The Federalist, No. 82, at 493 (A. Hamilton)(C. Rossiter ed. 1961). Early on, Chief Justice John Marshall wrote that once a federal court found a "sufficient foundation for jurisdiction, . . . then all the other questions must be decided as incidental to this, which gives that jurisdiction." *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738, 822 (1824).

Osborn further recognized a significant congressional role in authorizing that jurisdiction: "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal c]ourts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.* at 823. Professor Oakley has noted that Chief Justice Marshall's view has "aged well." Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes,* 69 TENN. L. REV. 35, 40 (2001)(citing *Verlinden B.V. v. Bank of Nigeria,* 461 U.S. 480, 492 (1983) and *American National Red Cross v. S.G.,*

505 U.S. 247, 253-55 (1992) as reaffirming the *Osborn* principles).

Although the Constitution established a system of "dual sovereignty," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), it also created a unitary system of justice to the extent that

> the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

The Federalist, No. 82, at 494 (Hamilton).

When the two court systems exercise concurrent jurisdiction, Congress retains responsibility for the borders between the state and federal courts. It has done so by authorizing the federal courts to restrain state courts from invading jurisdiction properly within the federal ambit. For example, the All Writs Act, 28 U.S.C. § 1651(a), authorizes a federal court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The Act "has served since its inclusion, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve "the rational ends of law."'" *Harris v. Nelson*, 394 U.S. 286, 299 (1969)(quoting *Price v. Johnson*, 334 U.S. 266, 282 (1948)). Unless otherwise restricted by Congress, the Act enables a federal court to utilize "all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its

sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

Similarly, the Anti-Injunction Act, 28 U.S.C. § 2283, while generally restricting injunctions to stay state proceedings, grants federal courts such power when "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Tolling provisions, like § 1367(d), utilize the same constitutional authority as the All Writs and Anti-Injunction acts. Like them, § 1367(d) is a necessary aid to jurisdiction. Congress has enacted similar tolling requirements before. Perhaps the earliest instance was when Congress tolled the limitations period for both civil and criminal cases during the Civil War. Stay Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864). A current tolling statute, effectuating the same purpose, is the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. § 525. State courts reviewing the constitutionality of that statute have upheld it. *See Perkins v. Manning*, 59 Ariz. 60, 122 P.2d 857 (Ariz. 1942);*Van Heest v. Veech*, 58 N.J. Super. 427, 156 A.2d 301 (N.J. Co. Ct. 1959). The Act has not been challenged on Tenth Amendment grounds in federal court, even though its application to military personnel who are not experiencing exigent circumstances would seem to have a lesser justification for congressional intrusion on state court matters than § 1367(d). *See Conroy v. Aniskoff*, 507 U.S. 511 (1993).

The Tenth Amendment concerns advanced by the South Carolina Supreme Court cast constitutional doubt on the validity of other federal statutes that impose stays upon state courts and state court procedures. For example, federal bankruptcy law imposes an automatic stay on all judicial proceedings against the debtor. 11 U.S.C. § 362(a). The stay serves a two-fold purpose: (1)

providing the debtor with a breathing spell from creditors and saving the debtor from expending resources in other litigation; and, (2) creating order among potential creditors by preventing them from pursuing their own remedies separate from the bankruptcy proceedings. *See Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 966 F.2d 457, 459 (9th Cir. 1992).

Because a statute of limitations might expire during the course of the automatic stay, the Bankruptcy Code provides a 30-day savings period that operates identically to § 1367(d). 11 U.S.C. § 108(c). Numerous courts have recognized that "[t]his section extends the statute of limitations for creditors in actions against the debtor, where the creditor is hampered from proceeding outside the bankruptcy court due to the provisions of 11 U.S.C. § 362 [the automatic stay provision]." *In re DiCamillo*, 186 B.R. 59, 61 (E.D. Pa. 1995)(quoting *Brickley v. United States (In re Brickley)*, 70 B.R. 113 (9th Cir. BAP 1986)). *See also Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993)(Section 108(c) "extended [the limitations period] for 30 days after notice of the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date.").

Moreover, the same considerations as engage a district court considering dismissal of the supplemental claim attend the decision of a bankruptcy court over whether relief should be granted from the automatic stay. "Comity and justice would dictate that this court abstain if the matter before it involves issues of State constitutional law, important State policy, or unsettled State law." *In re Broughton*, 49 B.R. 312, 316 (Bankr. N.D. Ill. 1985) *aff'd*, 60 B.R. 373 (N.D. Ill. 1986)(citing *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940)). *Compare* 28 U.S.C. § 1367(c).

Because the bankruptcy stay operates as an "aid to the exercise of federal jurisdiction" in the same manner as

section 1367(d), the reasoning of the South Carolina Supreme Court would mandate that it too be found unconstitutional.

The *Jinks* ruling also calls into question the validity of the federal Y2K Act, 15 U.S.C. § 6606(e)(4)(tolling during notice and remediation period for Year 2000-related claims) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9658 (setting a uniform limitations-period commencement date in suits under state law for damages due to hazardous release exposure).

Despite the questions raised by the South Carolina Supreme Court, these other federal acts are valid. The South Carolina ruling also raises serious issues about a federal court's authority to stay state proceedings as a matter of inherent judicial power. Section 1367(d) tolling works in a fashion that is similar to a federal court's authority to stay pending state proceedings during removal as a "protective device which keeps separate tribunals from adjudicating the merits of the same controversy." *Wood v. DeWeese*, 305 F. Supp. 939, 941 (W.D. Ky. 1969).

The decision below even casts doubt on the authority this Court may exercise during the pendency of a petition for certiorari, wherein a single justice of this Court may stay a state court of last resort's final judgment. *See, e.g., Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975)(Blackmun, J.)("As a single Justice, I clearly have the authority to grant a stay of a state court's 'final judgment or decree' that is subject to review by this Court on writ of certiorari."). Obviously, the exercise of such authority is an "aid to jurisdiction" in the same sense as § 1367(d).

Moreover, this Court has recognized that equitable tolling is permissible when consistent with congressional

intent in enacting a particular statutory scheme. *See Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Honda v. Clark*, 386 U.S. 484 (1967). The equitable tolling doctrine generally permits a statute of limitations to be tolled provided that there is timely notice, lack of prejudice to the defendant, reasonable and good faith conduct on the part of the plaintiff, and a prayer for the same remedies in each forum. *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131; 1133 (9th Cir. 2001).

That equitable relief available in federal court, even in diversity cases, is not restricted to what is available in state court. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 105-06 (1945). It is generally available when "a plain, adequate and complete remedy at law" is wanting. *Id.* at 105. "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. *Id.* at 106.

Section 1367(d) operates in similar fashion to the equitable tolling doctrine, but with statutory notice. It is difficult to imagine how it, endorsed by Congress, can be unconstitutional when equitable tolling is not.

C. The Necessary and Proper Clause Supports Congressional Authority under Article III

To the extent that Article III leaves some questions about the scope of congressional authority in aid of federal jurisdiction unanswered, the Necessary and Proper Clause fills in the picture. In its ruling, the South Carolina Supreme Court misconceived the constitutional status of the Necessary and Proper Clause when it found the Clause violated by § 1367(d). *Jinks*, 563 S.E.2d at 108. Petitioner understands the court's ruling to suggest that Congress was without authority to enact the tolling provision as a matter of its enumerated powers and those additional powers that are properly incident to them.

In discussing this issue, the South Carolina court conceded that the tolling provision was "necessary" as a "useful 'aid to the exercise of federal jurisdiction,'" but still found it not "'proper' . . . [because it] interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Jinks*, 349 S.C. at 304, 563 S.E.2d at 107 (citation omitted). In so ruling, the court misunderstood the constitutionally authorized scope of federal authority. The Necessary and Proper Clause states that "The Congress shall have Power . . .":

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, Sec. 8, cl. 18.

The court's reading of the word "proper" ascribes a weight to it that it cannot sustain. The requirement that a law be "proper" requires that Congress only exercise powers reasonably ancillary to express constitutional authority and not those otherwise prohibited. As a general proposition, "Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966)(citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Moreover, this Court has recognized that the Constitution gives Congress "'the necessary resources of flexibility and practicality . . . to perform its function.'" *Yakus v. United States*, 321 U.S. 414, 425 (1944)(citation omitted).

These teachings are in accord with Justice Story's Commentaries, which described the Necessary and Proper Clause .as removing all uncertainty about congressional authority to carry out its obligations. 3 Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 603, at 433 (1833; R. Rotunda ed. 1987). The test, Story wrote, is "whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress." *Id.*

With respect to judicial power, this Court has acknowledged that "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Hanna v. Plumer,* 380 U.S. 460, 472 (1965). Thus, to the extent doubt arises about congressional authority in support of federal jurisdiction, the Necessary and Proper Clause .allays that uncertainty.

It is worth noting that the South Carolina court's rationale – that the State alone may determine "the extent to which its political subdivisions are subject to suit" as an aspect of sovereignty – ignores the premise that underlies this Court's jurisprudence on federal civil rights under 42 U.S.C. § 1983, the same statute originally pleaded by the Petitioner to bring the matter into federal court. This Court has ruled that "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Department of Social Services,* 436 U.S. 658, 690 (1978).

The scope of § 1983 is such that lawsuits to vindicate federal civil rights may be brought in state court, even without the State's consent to the use of its courts. *See, e.g., Felder v. Casey,* 487 U.S. 131 (1988). In *Felder,* the Wisconsin Supreme Court had ruled that compliance with the state notice-of-claim requirement was a prerequisite to filing a § 1983 action. It reasoned that, "while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals." *Id.* at 137. Rejecting that argument, this Court held the "notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court." *Id.* at 138.

Similarly, the South Carolina limitations period "conflicts in both its purpose and effects" with the objectives of § 1367 and "will frequently and predictably produce different outcomes . . . solely on whether the claim is [heard] in state or federal court." It too must yield to the federal statute, which, in this instance, requires tolling.

The *Felder* Court further held that "where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" 487 U.S. at 138 (quoting *Brown v. Western R. Co.,* 338 U.S. 294, 296 (1949)). Moreover, state courts may not "impose unnecessary burdens upon the rights of recovery authorized by federal laws." *Brown,* 338 U.S. at 298-99. The *Felder* Court then determined that "the very notions of federalism upon which respondents rely dictate

that the State's outcome-determinative law must give way when a party asserts a federal right in state court." *Felder*, 487 U.S. at 150. For that reason, "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under federal law [are] protected." *Id.* at 151 (citations omitted).

A similar result should obtain here. In enacting § 1367, Congress accepted this Court's formulation in *Gibbs* that state and federal claims emanating from a "common nucleus of operative fact" comprise "but one constitutional 'case'" and thus grants "power in the federal courts to hear the whole." *Gibbs*, 383 U.S. at 725 (footnotes omitted) . As a single "constitutional 'case,'" the matter retains its federal character even after the federal claims have been dismissed, which is why the federal court may retain jurisdiction over what would otherwise be purely state claims. That calculus does not change merely because the federal court exercises discretion, in the interests of comity, to decline further jurisdiction over the state claims. The supplemental jurisdiction statute creates a uniquely federal remedy with a broad sweep. Tolling enters the picture only when a plaintiff has chosen the federal forum and it becomes unavailable to him or her, making § 1367(d) an indispensable aid to federal court jurisdiction.

There is one further reason Respondent's objection at the alleged federal override is ill-considered. Both before and after enactment of § 1367(d), the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Supp. 2001) continues to define the extent and timing of any lawsuit to vindicate the state claims at issue here. Petitioner was required to comply with that Act, in order to file her supplemental claim in federal

court. She did, by filing within the applicable statute of limitations. There was no override.

Without the tolling provision, the second application of the state limitations period becomes outcome-determinative in the manner discussed by the *Felder* Court. With it, the plaintiff stands on the same footing in state court as he or she did in federal court. Tolling, then, accomplishes the "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. 468 (footnote omitted). A tolling provision is palpably within congressional authority.

II. Section 1367(d) Does Not Violate the Tenth Amendment

The principal constitutional objection posed by the South Carolina Supreme Court's decision below focuses on the Tenth Amendment's reservation of rights to the States. The court held "§ 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth Amendment." 349 S.C. at 306, 563 S.E.2d at 108. Critical to that determination was the court's reliance on another court's description of the holding in *New York v. United States*, 505 U.S. 144 (1992). Specifically, the *Jinks* Court quoted the Fourth Circuit as saying the Tenth Amendment requires two inquiries:

> First, whether the regulation it embodies is within Congress' power as being within those enumerated in the Constitution. Second, whether, even if so, the means of regulation employed yet impermissibly infringe upon state sovereignty.

Jinks, 349 S.C. at 303, 563 S.E.2d at 106 (quoting *United States v. Johnson*, 114 F.3d 476, 480 (4th Cir. 1997)). The

court was evidently misled by that bowdlerization of this Court's holding. The States ceded some of their sovereign authority to the Union in order to unite under the Constitution. Where the Constitution grants federal authority, by definition, it was not reserved to the States. This Court's *New York* decision could not be clearer:

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York, 505 U.S. at 156.

As already discussed *infra*, Congress had full authority under Article III and informed by the Necessary and Proper Clause to enact § 1367(d). That is sufficient to take this question out of the ambit of the Tenth Amendment. Still, the Constitution provides further explicit confirmation of the power Congress exercised here. Congressional enactments are generally made binding on the States through the Supremacy Clause, which provides:

> Laws . . . which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the *Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2 (emphasis added). Explaining the Clause's scope, Chief Justice Marshall wrote, "acts of the State Legislatures . . . [which] interfere with, or are contrary to the laws of Congress, made in pursuance of

the constitution," are invalid under the Supremacy Clause, and "the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

In considering the conjunction between this constitutional command and the Tenth Amendment, this Court recently said:

> Although Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs, see *Printz [v. United States*, 521 U.S. 898,] 935 [(1997)]; *New York [v. United States]*, 505 U.S. [144,] 188 [(1992)], *it may require state courts . . . to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power*," *Printz, supra*, at 907.

Alden v. Maine, 527 U.S. 706, 752 (1999)(emphasis added).

As an aid to jurisdiction, the tolling provision is "appropriate for the judicial power." Its coercive effect operates solely on state judges, as authorized by the Supremacy Clause. Significantly, the exercise of that judicial power is not a matter in which a political subdivision or a private party is "be[ing] forced to entertain in [state] courts suits from which it was immune in federal court." *Howlett v. Rose*, 496 U.S. 356, 365 (1990). The matter was timely filed in a federal court with full authority to hear it, even after the federal predicate for original jurisdiction had fallen out. *See New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1505 (3d Cir. 1996); *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995); *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993). The

decision to defer to the state courts should not suddenly nonsuit the plaintiff. And nothing in the Tenth Amendment requires a contrary result.

In *Printz,* this Court examined the "historical understanding and practice, . . . the structure of the Constitution, and . . . the jurisprudence of this Court" to evaluate a Tenth Amendment claim. *Printz,* 521 U.S. at 905. Citing a variety of laws dealing with citizenship and naturalization issues, lawsuits over seaworthiness, and proofs of claims emanating from the Revolutionary War and ordering deportation of alien enemies, the *Printz* Court noted that "[t]hese early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Id.* at 906-07. The language and contemporaneous legislative understanding of the Supremacy Clause, which served as the basis for the *Printz* Court's declaration, provides insurmountable support for § 1367(d)'s imposition of a *de minimis* tolling period for supplemental claims that fully met the limitations period in its original filing in federal court and must now be refiled in state court.

Another source of historic understanding that this Court has always found to be of "great authority" for those purposes is The Federalist. *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 418 (1821). There, Hamilton wrote that the federal government's constitutionally authorized power to protect the rights of individual citizens "will enable the government to employ the ordinary magistracy of each [State] in the execution of its laws." The Federalist No. 27, at 176 (Hamilton). James Madison similar recognized that state court judges would be "clothed with the correspondent authority of the Union" in a variety of matters, including "the organization of the judicial power." *Id.*, No. 45, at 282 (J. Madison).

Because of this necessary reliance on state courts, Hamilton wrote,

> the national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

The Federalist, No. 82, at 494 (Hamilton).

Because the Constitution anticipates a unitary system of justice in the enforcement of federal interests and supplemental claims that are joined with federal ones comprise but a single "constitutional 'case,'" *Gibbs,* 383 U.S. at 725, then it logically follows that Congress may require state courts to hear those claims that have been divorced from the federal ones that impart original jurisdiction in the federal courts. After all, a single claim "arising under" federal law creates the federal nexus that fits within Article III power. *See Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 386 (1998). And such supplemental claims "are not 'separate and independent' for purposes of removal," *Cohill,* 484 U.S. at 354, and should not be viewed otherwise here. The only relevant inquiry as to whether Congress may impose these cases on the states is whether the state law claims "'are so related to [the federal] claims . . . that they form part of the same case or controversy.'" *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 167 (1997)(quoting 28 U.S.C. § 1367(a)). Here, they indisputably are.

More support for the unitary nature of the state and federal court systems where concurrent jurisdiction is applicable can be found *Guaranty Trust Co. v. York,* 326 U.S. 99, 108 (1945), where this Court observed that "a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect only another court of the State." *Guaranty Trust Co. v. York,* 326 U.S. 99, 108 (1945). The same should obviously be true when a federal court, exercising supplemental jurisdiction, considers a state law claim after the federal claim has fallen away. Filing in it, therefore, should satisfy the state limitations requirement.

The federal interest continues, even after dismissal, because the disposition is without prejudice. Dismissal without prejudice means that a plaintiff, once any other remedies have been exhausted, may return to court. *See Seniority Research Group v. Chrysler Motor Corp.,* 976 F.2d 1185 (8th Cir. 1992). Thus, the district court retains a residuary jurisdiction. If the federal court may retrieve the dismissed case and make a decision on the merits, it is hard to imagine how enabling a state court to do so through a tolling of the limitations period invades an aspect of the State's sovereignty.

In fact, the invasion asserted by the South Carolina Supreme Court seems entirely illusory. To file a supplemental claim in federal court, a plaintiff must meet the state statute of limitations. As this Court held in *Guaranty Trust,* where one is barred by the statute of limitations from recovery in state court, one should be likewise barred in federal court. Elaborating on this truism in *Ragan v. Merchants Transfer & Warehouse Co., Inc.,* 337 U.S. 530, 533-34 (1949), this Court found it could not "give [an action] longer life in the federal court than it would have had in the state court without adding something to the cause of action." Here, § 1367(d) gives no longer life to a cause of action but seeks to transfer a

live cause of action from federal court, where it can receive final disposition, to the constitutionally preferable provided in state court. The underlying action has already surmounted the hurdle of timeliness imposed by the limitations period and no prejudice is worked to any party. Because the plaintiff is properly in federal court under the state limitations rules, he or she should not be barred from state court because the plaintiff is not likewise barred from federal court.

For that reason, the State's interests – and the defendant's interests – are fully met. A "statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim." *Walker v. Armco Steel Corp.,* 446 U.S. 740, 751 (1980).

The law of South Carolina does not treat statutes of limitation differently. Its Supreme Court recently declared: "The limitations period is intended to run against those who are neglectful of their rights and who fail to exercise reasonable diligence in enforcing their rights. However, it is not the policy of the law to unjustly deprive an injured person of a remedy." *Moriarty v. Garden Sanctuary Church of God,* 534 S.E.2d 672, 679 (S.C. 2000). In South Carolina, the limitations period serves two fundamental purposes, consistent with the teachings of this Court: one purpose "is to relieve the courts 'of the burden of trying claims when a plaintiff has slept on his rights'" and another "is to protect potential defendants from protracted fear of litigation." *Moates v. Bobb,* 470 S.E.2d 402, 404 (S.C. Ct. App. 1996)(quoting *Burnett v. New York Cent. R.,* 380 U.S. 424, 428 (1965)(other citations omitted).

Because a conflict between a federal right and state law favors the right, this Court has found it useful to

examine the extent of that right in "relation to the operation of state laws." *Board of Comm'rs v. United States*, 308 U.S. 343, 350 (1939). That examination reveals that none of the underlying purposes of the limitation period are abridged when, as here, the claim was timely pursued in a federal court with full jurisdiction to decide the matter, but was determined better tried in state court. Neither Petitioner nor any § 1367 plaintiff will have slept on her rights or have proffered stale claims; each will have brought the lawsuit within the requisite state-imposed time period; and each will have been obliged to pursue the matter vigorously during its pendency in district court. Neither Respondent nor any § 1367 defendant can claim surprise and disadvantage; each will have been prepared to defend itself in district court and, because of the tolling provision, must instead mount that defense in state court. Finally, the tolling provision satisfies the South Carolina policy of not using a limitations period "to unjustly deprive an injured person of a remedy." *Moriarty*, 534 S.E.2d at 679. An examination of the federal right preserved by the tolling provision works no violence to South Carolina law.

In a strikingly similar fact pattern, this Court found the filing of a case in a federal administrative forum to satisfy the State's interest in its statute of limitations. It noted that such limitations periods

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 342, 348-49 (1944). In that decision, this Court rejected an argument that a state statute of limitations barred a collective bargaining enforcement action brought in federal court after an administrative board had adjudicated the issue. The employer had argued that the state statute of limitations had expired during the pendency of the administrative board hearing, rendering the enforcement action out of time. Writing for the Court, Justice Jackson rejected the argument, flatly stating that a "state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." *Id.* at 348.

In reaching that conclusion, this Court noted that the legitimate purposes of notice and avoidance of stale claims undergirding the limitations period had been served by timely adjudication before a federal tribunal. Commencement of a federal administrative action had put the defendant on notice and the continuing nature of the dispute before adjudicatory bodies assured that the claim was not stale and that the evidence remained available. As a practical matter, this Court found "it cannot be said that the claims were not timely pursued. Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed." *Id.* at 349.

The logic of the decision has considerable force in Petitioner's case. The tolling provision of § 1367 operates on the same principle enunciated in *Railroad Telegraphers*. It provides a *de minimis* window in which a plaintiff may refile in state court if the limitations period expires during the pendency of the federal district court action. In the instant case, Petitioner's original federal court action, including the supplemental claim, were timely filed and fully pursued, evidencing no neglect and no prejudice to the defendant.

In 1965, this Court considered a case that constituted the mirror image of the current issue. Its resolution is instructive for today's issue. In *Burnett v. New York Central R. Co.*, 380 U.S. 424 (1965), an action was commenced under the Federal Employers' Liability Act in Ohio state court, but subsequently dismissed on venue grounds. Within eight days of dismissal, the plaintiff brought a new action in federal district court. That, too, was dismissed, this time, however, because it was barred by the statute of limitations, which expired while the matter was in state court. The issue went to this Court on plaintiff's claim that the limitation period was tolled during the pendency of his state court action.

This Court unanimously held that the "state action . . . was properly 'commenced within the meaning of the federal limitation statute," that the initial filing tolled the limitations period, and that plaintiff's federal action was timely. *Id.* at 426. To arrive at this conclusion, this Court examined the nature of statutes of limitation, finding that they "are primarily designed to assure fairness to defendants." *Id.* at 428. Limitations periods accomplish fairness by "'preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* (quoting *Railroad Telegraphers*, 321 U.S. at 348-49.

Still, however important those purposes are, they are "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Id.* Examples mustered by *Burnett* Court included instances where the defendant misled the plaintiff into believing there was more time to commence the action or where war prevented the plaintiff from bringing the action in time. *Id.* at 428-29.

In *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867), this Court imposed a tolling period, without statutory

basis, on a lawsuit brought by a resident of New Hampshire against a resident of Arkansas shortly after the Civil War. Though the suit was untimely under the relevant state statute of limitations, this Court recognized that plaintiff's rights and remedies were suspended during the war because the courts had not then been open and available to the parties. The Court noted that the statute of limitations contained no express exception regarding war periods, but found that it was necessary to impose one. The tolling rule established in *Hanger* "has been consistently followed in the federal courts." *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947). Citing *Osbourne*, the *Burnett* Court noted that "[i]n such cases a plaintiff has not slept on his rights but, rather, has been prevented from asserting them." *Burnett*, 380 U.S. at 429.

The *Burnett* Court also found that tolling is appropriate where the plaintiff "did not sleep on his rights but brought an action within the statutory period in the state court of competent jurisdiction. . . . [The defendant] could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his" cause of action. *Id.* at 429-30. The Court went on to note that "[b]oth federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run." *Id.* at 430.

These cases make apparent that the judicial power extends to tolling the limitations period where justice would otherwise be denied. Because Congress enacted § 1367 to extend to the full measure of Article III authority, the tolling provision is well within constitutional limits on federal judicial power and must be found constitutional.

The propriety of congressional enactment of a tolling provision becomes even more compelling when one

examines the precedents that permit a federal court to override a state limitations period. South Carolina, where this action arose, has previously recognized that those lawsuits "which the Constitution has placed under national power to control in 'its substantive *as well as its procedural* features,'" pose only the question of "whether Congress intended [the federal] statute to preclude the operation of different state limitations statutes in respect to [that action]." *Konrad v. South Carolina Electric and Gas Co.*, 308 S.C. 167, 170, 417 S.E.2d 557, 559 (S.C. 1992)(citations omitted). Where the answer is yes, the federal rule must be followed. *Id.*

The *Konrad* decision recites a truism, anchored in the decisions of this Court. State statutes of limitation are susceptible to being overridden when they "'frustrate or interfere with the implementation of national policies'" or are "at odds with the purpose or operation of federal substantive law." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)(quoting *DelCostello v. Teamsters*, 462 U.S. 151, 161 (1983)). Such overrides often occur where the state limitations period fails "'to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights.'" *Id.* at 36 (quoting *DelCostello*, 462 U.S. at 166.

Even if the limitations period cannot be considered met by the timely filing in federal court, it is clear that South Carolina's limitations period frustrates clearly stated national polices and are at odds with the purpose and operation of federal law.

Perhaps the proper question to pose when deciding whether a federal tolling rule should be upheld against federalism concerns was framed in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996): "Would 'application of the [standard] . . . have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against

citizens of the forum state, or] be likely to cause a plaintiff to choose the federal court?"

Here, the answer to the *Gasperini* question is clear. Application of the tolling provision does not unfairly discriminate against citizens of the forum state nor does it make it more likely that the litigation would take place in federal court. In fact, in line with the comity concerns that animated Congress, application of the tolling rule accommodates state interests and increases the likelihood that state claims appended under supplemental jurisdiction will be heard in the forum state's courts.

Madison recognized that the "Gordian Knot of the Constitution seems to lie in the problem of collision between the federal & State powers, especially as eventually exercised by their respective Tribunals." *Quoted in* J. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1539 (2002)(quoting Letter from James Madison to Spencer Roane (Jun. 29, 1821), in James Madison, Writings 777 (J. Rakove ed., 1999)). Madison suggested two approaches to cut that knot: avoidance or a "sounder policy" that would allow federal judicial needs "to prevail." *Quoted in id.* at 1539-40 (quoting Letter, at 778).

Tolling works no prejudice to State interests, but instead accommodates those interests. Federal judicial needs and litigants' rights, both of which are served by tolling, ought to prevail here.

III. The Tolling Provision Prevents Discrimination against a Federal Right

Tenth Amendment concerns surely evaporate when state law discriminates against litigants asserting federal constitutional rights. In *James v. Kentucky*, 466 U.S. 341 (1984), this Court held that a litigant cannot be compelled to comply with state procedural rules so onerous that they

unreasonably burden the exercise of those rights. In *Nash v. Florida Industrial Comm'n,* 389 U.S. 235 (1967), a state law that penalized an individual for seeking federal judicial redress, with one penalty being forfeiture of any related state law claim against the same defendant, was found unconstitutional.

Enforcement of the limitations period operates to cause the same result that the *Nash* Court condemned. Petitioner could have filed her federal and state claims in state court. If she had, she could have expected a decision on the merits on all causes of action. Instead, she filed in federal court, not mistakenly but as a matter of right. There, too, she might have received a decision on the merits on all her causes of action. Instead, in the interests of comity, the district court dismissed her state claims so that they could be adjudicated in state court. Now, however, like the law reviewed in *Nash*, state law in the form of the limitations period, penalizes her with forfeiture of her state law claims for having pursued them in federal court. This is not a result the Constitution tolerates.

South Carolina's insistence on strictly enforcing its statutory limitations period, already met by the original filing in federal court, impermissibly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). Here, as with § 1983, "Congress chose to provide injured persons with immediate access to *federal* courts, [although] it did not leave the protection of such rights exclusively in the hands of the federal judiciary." *Felder,* 487 U.S. at, 147 (1988)(citing *Patsy v. Board of Regents of Florida,* 457 U.S. 496, 503-04, 506-07 (1982)).

The access to justice purpose behind § 1367 and its tolling of the state limitations period, *see* S. REPT. NO. 101-416, at 1, *reprinted in* 1990 U.S.C.C.A.N. 6803, 6804,

occupy a high place in the constitutional order. "Justice is the end of government," wrote Madison. "It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." The Federalist No. 51, at 324 (Madison). He added, that to the end of achieving justice, "the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the *federal principle." Id.* at 325 (emphasis in original). Tolling of supplemental claims constitutes such a judicious modification and mixture.

Echoing Madison's sentiments about the place of access to justice in the pantheon of constitutional principles, this Court long ago held that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). To that end, "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison,* 349 U.S. 133, 136 (1955). That means that due process assures that a litigant can make his case "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). Removing the tolling provision from the statute results in a denial of due process by preventing the plaintiff from ever making her case before a court.

Earlier this year, this Court recognized that a constitutionally based access to court claim exists "to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury,* 122 S. Ct. 2179, 2186 (2002). Read together with the earlier cases, this Court had established that a timely lawsuit, properly invoking the jurisdiction of the federal courts, cannot lose its

legitimacy and constitutional protection when it is subsequently determined that the case might be better heard in state court. Refiling in state court in order to respect state authority cannot abridge that authority and should not deprive that plaintiff of any ability to seek judicial vindication. Yet, that, unfortunately, is what the South Carolina Supreme Court's decision would do.

It matters little that South Carolina has a legitimate interest in its limitations period. Most state laws are supported by various legitimate interests. Even so, those laws must be set aside when they discriminate against federal rights, or, as one treatise puts it, *do not afford* a litigant "*a reasonable opportunity to assert federal rights.*" 16B Wright, at § 4027, at 392. *See also Lee v. Kemna,* 534 U.S. 362, 391-92 (2002)(Kennedy, J., dissenting); *Dice v. Akron, Canton & Youngstown R. Co.,* 342 U.S. 359, 361 (1952)("State laws are not controlling in determining what the incidents of this federal right shall be."); *Davis v. Wechsler,* 263 U.S. 22, 24-25 (1923) (Holmes, J.)("the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . local practice shall not be allowed to put unreasonable obstacles in the way.").

State courts must enforce laws within a federal overlay. Since the First Congress, state courts have had to enforce federal policies and laws. *Testa v. Katt,* 330 U.S. 386, 389-91 (1947). The "policy of the federal Act is the prevailing policy in every state." *Id.* at 393. Relying on this precedent, this Court recently declared, "state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause." *Printz,* 521 U.S. at 928 (parenthetical omitted).

The decision of the South Carolina Supreme Court rests heavily on its determination that statutes of limitation are an attribute of state sovereignty that brook no federal interference, regardless of the purpose or

constitutional basis of the authority. *Jinks,* 563 S.E.2d at 108. This Court has repeatedly refuted that position in the past. Though great deference is shown state limitations choices, this Court has noted that

> State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide."

DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 161 (1983)(citations omitted).

For that reason, "when the operation of a state limitations period would frustrate the policies embraced by the federal enactment, this Court has looked to federal law for a suitable period." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 355-56 (1991). Circumstances that admit of that action include state limitations periods that provide only a truncated period of time within which to file suit because such statutes inadequately accommodate the federal scheme and are inconsistent with Congress's compensatory aims. *See Burnett v. Grattan,* 468 U.S. 42, 50-55 (1984).

Similarly, the discrimination against federal rights affected by the limitations period cannot stand. Renewed application of the limitations period by South Carolina discriminates against litigants choosing to pursue federal rights. It discriminates between a claimant who goes directly to state court and is regarded as timely for all claims and one who chooses to pursue the federal and state claims in federal court, where he or she may lose the chance to pursue state claims. As a result, application of

the statute of limitations impermissibly produces different outcomes based on whether the action began in state or federal court.

Thus, without the tolling provision, there is a substantial possibility – significant enough to constitute a limitation on access to justice – that the state claims presented to the courts for redress by the plaintiff would receive no judicial audience. That result would work a serious injustice, leaving valid claims unheard and causing a significant waste of judicial resources, the same concerns that "motivated the creation of pendent jurisdiction in the first place." *Shanaghan,* 58 F.3d at 111-12.

It is safe to conclude with respect to the supplemental jurisdiction statute, as this Court did in *Wilson v. Garcia,* 471 U.S. 261, 269 (1985) with respect to Civil Rights Act of 1871, 28 U.S.C. § 1983, which is the underlying cause of action in this case, that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." But that is the consequence of what South Carolina has ruled here.

Here, Congress established a right to take a federal cause of action and a state claim ancillary to it to federal court. It created as well a means by which the federal court could cede responsibility to hear the state matter to state court by tolling the applicable statute of limitations. Congress had such authority and exercised it prudently to recognize both plaintiffs' fundamental due process rights and the rights of the State. Application of a rule that allows defendants to reassert the statute of limitations after the legal contest was timely begun is a "harsh . . . rule" that "is wholly incongruous with the general policy of the Act." *Dice,* 342 U.S. at 362.

The tolling provision prevents that discrimination and must be respected. It constitutes an elegant and narrowly tailored solution to the problem of concurrent jurisdiction that respects, rather than transgresses, federalism principles and values. Without it, the prudent plaintiff would be well advised to choose state court, obviating the federal scheme and the intention of Congress to provide a federal forum in § 1367. The tolling provision is constitutional.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2874

BRADFORD P. SIMPSON
SUGGS AND KELLY, P.A.
Post Office Box 8113
Columbia, S.C. 29202
(803) 461-2163

JOHN D. KASSEL
THEILE BRANHAM
KASSEL LAW FIRM
Post Office Box 1476
Columbia, S.C. 29202
(803) 256-4242

JAMES MIXON GRIFFIN
SIMMONS AND GRIFFIN, L.L.C.
Post Office Box 5
Columbia, S.C. 29202
(803) 779-4600

*Counsel of Record *Counsel for Petitioners*

December 5, 2002

Supreme Court, U.S.
FILED
DEC 4 2002

No. 02-258

In the Supreme Court of the United States

SUSAN JINKS, PETITIONER

v.

RICHLAND COUNTY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 28 U.S.C. 1367(d), the tolling provision of the federal supplemental jurisdiction statute, is constitutional as applied to claims against a county defendant.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	15
Argument:	
The tolling provision of 28 U.S.C. 1367(d) is constitutional on its face and as applied to state-law claims asserted against a unit of local government	18
A. The supplemental jurisdiction provisions of 28 U.S.C. 1367(a) and (c) are a valid exercise of Congress's authority to define the jurisdiction of the federal courts	18
1. Under Article III of the Constitution, the judicial power to decide "cases" arising under federal law extends to the resolution of state-law claims that are related to the federal cause of action	18
2. In 28 U.S.C. 1367(a) and (c), Congress sought to promote the efficient resolution of suits raising related federal- and state-law claims, while avoiding unnecessary state-law rulings by the federal courts	20
B. The tolling provision of 28 U.S.C. 1367(d) is valid as a measure "necessary and proper" to achieve the objectives of the related provisions defining the pendent-claim jurisdiction of the federal courts	21

Table of Contents—Continued: Page

1. Section 1367(d) preserves the balance struck in Section 1367(a) and (c) between efficient resolution of related claims and avoidance of unnecessary state-law rulings by the federal courts 21
2. Section 1367(d) is a constitutionally permissible means of achieving Congress's objectives 25

C. Section 1367(d) is constitutional as applied to state-law claims against a county defendant 31
1. Local governments have no constitutional immunity from private suits authorized by Congress 32
2. Congress's reasons for enacting Section 1367(d) apply with full force to suits against local governments 34
3. The Court's decision in *Raygor* supports the application of Section 1367(d) to counties and municipalities 34

Conclusion 37

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999) 32
Aldinger v. *Howard*, 427 U.S. 1 (1976) 7
Blatchford v. *Native Vill. of Noatak*, 501 U.S. 775 (1991) 35
Board of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 32
Carnegie-Mellon Univ. v. *Cohill*, 484 U.S. 343 (1988) 6
City of Chicago v. *International Coll. of Surgeons*, 522 U.S. 156 (1997) 8

Cases—Continued: Page

Cooley v. *Pennsylvania Hous. Fin. Agency*, 830 F.2d 469 (3d Cir. 1987) 6
Duckworth v. *Franzen*, 780 F.2d 645 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986) 6
Edwards v. *Okaloosa County*, 5 F.3d 1431 (11th Cir. 1993) 6
Felder v. *Casey*, 487 U.S. 131 (1988) 26
Financial Gen. Bankshares, Inc. v. *Metzger*, 680 F.2d 768 (D.C. Cir. 1982) 6
Finley v. *United States*, 490 U.S. 545 (1989) 5, 7
Giardiello v. *Balboa Ins. Co.*, 837 F.2d 1566 (11th Cir. 1988) 6
Graham v. *John Deere Co.*, 385 U.S. 1 (1966) 25
Henson v. *Columbus Bank & Trust Co.*, 651 F.2d 320 (5th Cir. 1981) 6
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 27
Howlett v. *Rose*, 496 U.S. 356 (1990) 27, 28, 32
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 25
Minneapolis & St. Louis R.R. v. *Bombolis*, 241 U.S. 211 (1916) 28
Mondou v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1 (1912) 28
Monell v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) 34
Mt. Healthy City Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 32-33
Nash v. *Florida Indus. Comm'n*, 389 U.S. 235 (1967) 23
New York v. *United States*, 505 U.S. 144 (1992) 27
O'Brien v. *Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54 (7th Cir. 1979) 6
Order of R.R. Telegraphers v. *Railway Express Agency*, 321 U.S. 342 (1944) 27

Cases—Continued: Page

Pennhurst State Sch. & Hosp. v. *Halderman*, 465 U.S. 89 (1984) 19
Raygor v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999 (2002) 11, 12, 19, 34, 35, 36
Regents of the Univ. of Cal. v. *Doe*, 519 U.S. 425 (1997) 32
Stewart v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870) 16, 28, 29
Terral v. *Burke Constr. Co.*, 257 U.S. 529 (1992) 24
Testa v. *Katt*, 330 U.S. 386 (1947) 28
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 4, 5, 18, 19, 20, 21, 22, 25
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 36

Constitution and statutes:

U.S. Const.:
Art. I 30
§ 8, Cl. 9 26
§ 8, Cl. 18 (Necessary and Proper Clause) 13, 14, 25
Art. III 5, 13, 15, 18, 20
§ 2 18
Art. VI, Cl. 2 (Supremacy Clause) 23, 27, 28, 33
Amend. VIII 13
Amend. XI 19, 34
Amend. XIV 32
§ 5 26
Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 310(a), 104 Stat. 5113 8
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 525 30
28 U.S.C. 1331 23
28 U.S.C. 1367 ..... 2, 3, 8, 10, 15, 35
28 U.S.C. 1367(a) ..... *passim*
28 U.S.C. 1367(c) ..... *passim*

Statutes—Continued: Page

28 U.S.C. 1367(c)(3) 9, 13, 20
28 U.S.C. 1367(d) ..... *passim*
28 U.S.C. 1447 7
42 U.S.C. 1983 ..... 12, 23, 24, 26, 34, 36
South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Law. Co-op. 2002) 12

Miscellaneous:

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969) 10, 11, 27, 30, 31
Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. (1990) 8, 21
H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990) 8, 10
Denis McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849 (1992) 6, 8, 24
Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213 (1991) 10, 11
John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855 (1998) 24
Report of the Federal Courts Study Committee (Apr. 2, 1990) 8
Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1 (1992) 8

In the Supreme Court of the United States

No. 02-258

SUSAN JINKS, PETITIONER

v.

RICHLAND COUNTY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (Pet. App. 2a-10a) is reported at 563 S.E.2d 104. The judgment of the South Carolina Court of Common Pleas (Pet. App. 11a-12a) is not reported. A prior opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 13a-20a) is unpublished, but the decision is noted at 163 F.3d 598 (Table). A prior order of the United States District Court for the District of South Carolina (Pet. App. 21a-22a) is not reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina (Pet. App. 11a-12a) was entered on April 22, 2002. The petition for a writ of certiorari was filed on July 18, 2002, and was granted on October 21, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1257(a). On November 12, 2002, the Court granted the motion of

the United States to intervene in the case pursuant to 28 U.S.C. 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Pertinent constitutional provisions are reproduced at Pet. App. 26a-29a.

2. Section 1367 of Title 28, United States Code, provides in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal Statute, in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims within the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.
>
> * * * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law;
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;

> (3) the district court has dismissed all claims over which it has original jurisdiction;
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. 1367. The question presented here is whether the application of Section 1367(d) to extend the statute of limitations in a suit against a county such as respondent, which is entitled to a degree of state-law immunity, raises any constitutional difficulty.

STATEMENT

The federal supplemental jurisdiction statute, 28 U.S.C. 1367, was enacted in 1990. Section 1367(a) and (c) codify pre-existing judge-made rules and define the circumstances under which a federal court should exercise pendent jurisdiction over a state-law claim that is factually related to a federal cause of action. Section 1367(d) provides that, when a pendent state-law claim asserted under Section 1367(a) is dismissed by the federal court and subsequently refiled in state court, the applicable statute of limitations is tolled during the pendency of the federal action and for 30 days thereafter. In the present case, the South Carolina Supreme Court held that Section 1367(d) is unconstitutional as

applied to a state-law claim against a county defendant, on the ground that the federal statute impermissibly intrudes upon the State's authority to define the conditions upon which its political subdivisions will be subject to suit.

1. a. In *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), this Court addressed the question whether and under what circumstances a federal district court, in adjudicating a federal cause of action, may also resolve related state-law claims. Although no federal statute spoke directly to the question, the Court articulated a broad view of the power of federal courts to adjudicate "pendent" state-law claims, even where those claims standing alone would not come within the court's jurisdiction. The Court explained:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim [arising under federal law], and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

Id. at 725 (footnotes and citation omitted). The decision in *Gibbs* reflected this Court's determination "that federal courts have 'pendent' claim jurisdiction—that is, jurisdiction over nonfederal claims between parties

litigating other matters properly before the court—to the full extent permitted by the Constitution." *Finley* v. *United States*, 490 U.S. 545, 548 (1989).

The Court in *Gibbs* explained, however, that the Article III power to resolve pendent state-law claims "need not be exercised in every case in which it is found to exist." 383 U.S. at 726. The Court observed that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Ibid.* The Court explained that the exercise of pendent-claim jurisdiction is ordinarily inappropriate if "the federal claims are dismissed before trial," or if "it appears that the state issues substantially predominate." *Ibid.* The Court also noted that although the presence or absence of Article III *power* to adjudicate a pendent claim can ordinarily be determined at the outset of a case, "the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage." *Id.* at 727. The Court thus expressly contemplated the possibility that a pendent claim over which the district court initially and appropriately assumed jurisdiction might properly be dismissed at a later point in the litigation.

b. The Court in *Gibbs* contemplated that, if a district court found the continued exercise of pendent-claim jurisdiction to be inappropriate in a particular case, the state claims would "be dismissed without prejudice and left for resolution to state tribunals." 383 U.S. at 726-727. In practice, however, the district courts' exercise of discretion to dismiss such claims was often skewed

by the concern that, if dismissed, a state-law claim might subsequently be deemed untimely when refiled in state court. See Denis McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 983 (1992). Indeed, several courts of appeals held it to be an abuse of discretion for a district court to dismiss a pendent claim without considering whether the claim would be time-barred in state court.[1] To avoid leaving plaintiffs without a state-law remedy, the district courts would retain jurisdiction over cases that, apart from the time-bar concern, properly belonged in state court.[2]

---

[1] See, *e.g.*, *Giardiello* v. *Balboa Ins. Co.*, 837 F.2d 1566, 1571 (11th Cir. 1988); *Cooley* v. *Pennsylvania Hous. Fin. Agency*, 830 F.2d 469, 476 (3d Cir. 1987); *Henson* v. *Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981) (per curiam); *O'Brien* v. *Continental Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54, 64-65 (7th Cir. 1979). Some courts made a discretionary dismissal of pendent claims contingent upon the defendant's waiver of any applicable statute of limitations defense. See, *e.g.*, *Edwards* v. *Okaloosa County*, 5 F.3d 1431, 1435 n.3 (11th Cir. 1993); *Duckworth* v. *Franzen*, 780 F.2d 645, 657 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986); *Financial Gen. Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982).

[2] This Court expressed a similar concern in addressing the related question whether a district court may remand to state court, rather than dismiss, pendent state-law claims in cases originally filed in state court and then removed to federal court. The Court concluded that "a remand generally will be preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 351-352 (1988). In that situation, the Court observed, dismissal "may work injustice to the plaintiff," because "a dismissal will foreclose the plaintiff from litigating his claims." *Id.* at 352. Congress subsequently enacted

c. In *Finley*, this Court addressed the distinct question of "pendent-*party* jurisdiction, that is, jurisdiction over parties not named in any claim that is independently cognizable by the federal court." 490 U.S. at 549. The Court "assume[d], without deciding, that the constitutional criterion for pendent-party jurisdiction is analogous to the constitutional criterion for pendent-claim jurisdiction." *Ibid.* The Court held, however, that absent express congressional authorization, it would not construe the applicable jurisdictional statutes to permit the addition of pendent parties against whom no claim had been asserted that was independently within the jurisdiction of the district court. *Ibid.*; see *id.* at 549-556; *Aldinger* v. *Howard*, 427 U.S. 1, 14-19 (1976). Moreover, although the Court in *Finley* disavowed any intent to revisit the holding of *Gibbs* (see 490 U.S. at 556), the Court observed that *Gibbs* was a departure from the usual rule that a federal court may exercise jurisdiction only to the extent expressly authorized by Congress. See *id.* at 547-548, 556. The Court noted, in addition, that the body of judge-made law regarding the permissible exercise of pendent jurisdiction "can of course be changed by Congress." *Id.* at 556.

2. a. The year after this Court's decision in *Finley*, the Federal Courts Study Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction,

---

legislation to make a remand mandatory, rather than discretionary, when, as in *Cohill*, subsequent events deprive the district court of subject-matter jurisdiction. See 28 U.S.C. 1447. A remand to state court is not an available option, however, when the plaintiff's suit is initially filed in federal court.

including claims, within federal question jurisdiction, that require the joinder of additional parties." *Report of the Federal Courts Study Committee* 47 (Apr. 2, 1990); see *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 155-156 (1990) (*House Hearing*) (statement of Judge Deanell R. Tacha, Chairman, Judicial Conference Committee On The Judicial Branch, expressing support for supplemental jurisdiction legislation); *id.* at 686 (letter from Professor Arthur D. Wolf noting academic support for such legislation). Congress responded by enacting the Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 310(a), 104 Stat. 5113, which added a new 28 U.S.C. 1367 to the United States Code. See generally Denis McLaughlin, *supra*; Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1 (1992). Section 1367 generally codifies the doctrine of pendent-claim jurisdiction that was recognized in *Gibbs*. See H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 n.15 (1990) (*House Report*); *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 164-165 (1997). Section 1367 also provides the congressional authorization for pendent-party jurisdiction that the Court had found lacking in *Finley*. See *House Report* 29. Section 1367 authorizes both pendent-claim and pendent-party jurisdiction under the general rubric of supplemental jurisdiction. See Pet. App. 5a n.4.

Section 1367(a) provides as a general rule that

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.

28 U.S.C. 1367(a). Section 1367(c) identifies various circumstances in which the district court may decline to adjudicate pendent state-law claims even though the requirements of Section 1367(a) are satisfied. Section 1367(c) states that "[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if," *inter alia*, "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. 1367(c)(3).

b. The provision specifically at issue in this case is 28 U.S.C. 1367(d), which governs the refiling of claims in state court after a federal-court lawsuit has been dismissed. Section 1367(d) states: "The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." The purpose of this provision is to hold a plaintiff harmless for a decision to file a pendent state-law claim in federal court, if the federal-law claim is subsequently dismissed, and to obviate the need to file a duplicative action in state court. Section 1367(d)'s effect is, under some circumstances, to require a state court to treat a state-law claim as timely filed even though the claim would be regarded as time-barred

under applicable state-law limitations and tolling principles.

Three law professors who had assisted in the drafting of Section 1367 (see *House Report* 27 n.13) explained shortly after the statute's enactment that Section 1367(d) mirrors a tolling provision that was proposed as part of the American Law Institute's 1969 recommendation to codify pendent-claim jurisdiction. Thomas M. Mengler et al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 216 n.28 (1991); see *Study of the Division of Jurisdiction Between State and Federal Courts* (1969) (*ALI Study*).[3] The *ALI Study* considered, and rejected, a possible constitutional objection to the proposed tolling provision, namely "that the statute of limitations governing a state cause of action is a matter reserved exclusively for state determination, and that it is an invalid exercise of federal power to direct a state court to entertain such a cause if it would be barred under the state's own law." *ALI Study* 453. The *ALI Study* explained:

---

[3] Specifically, the provision proposed by the American Law Institute in 1969 would have stated:

> (b) If any claim in an action timely commenced in a federal court is dismissed for lack of jurisdiction over the subject matter of the claim, a new action on the same claim brought in another court shall not be barred by a statute of limitations that would not have barred the original action had it been commenced in that court, if such new action is brought in a proper court, federal or State, within thirty days after dismissal of the original claim has become final or within such longer period as may be available under applicable State law.

ALI Study 65.

> Congress has the authority to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in the government of the United States, and among these is the judicial power conferred by Article III. It is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous. Moreover, it is clearly in the interest of sound judicial administration to adopt a procedure under which a plaintiff need not file simultaneous actions in two courts in order to ensure that his action will not be barred by the statute of limitations following a dismissal in one of them.

Id. at 453-454; see Thomas M. Mengler et al., *supra*, 74 Judicature at 216 n.28 (quoting *ALI Study* 65).

c. In *Raygor* v. *Regents of the University of Minnesota*, 122 S. Ct. 999 (2002), this Court addressed the application of 28 U.S.C. 1367(a) and (d) to pendent state-law claims asserted against an arm of the State. Based on the absence of any express statutory reference to such claims, the Court held that Section 1367(a)'s grant of pendent-claim jurisdiction "does not extend to claims against nonconsenting state defendants." 122 S. Ct. at 1005. The Court next considered whether Section 1367(d) "tolls the statute of limitations for claims against nonconsenting States that are asserted under § 1367(a) but subsequently dismissed on Eleventh Amendment grounds." *Ibid.* The Court explained that application of the statute in that setting "raises serious doubts about the constitutionality of the

provision," *ibid.*, because "allowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity," *id.* at 1006. Finding no clear evidence of congressional intent that Section 1367(d) should apply to such claims, see *id.* at 1006-1007, the Court concluded that it "w[ould] not read § 1367(d) to apply to dismissals of claims against nonconsenting States dismissed on Eleventh Amendment grounds," *id.* at 1007. The Court did not address the constitutionality of Section 1367(d) as applied to consenting States or to defendants other than States, and it nowhere suggested that anything other than the traditional federal-law principles used to determine whether an entity is an arm of the State would define the scope of Section 1367(a) and (d).

3. a. In October 1994, Carl Jinks was arrested and confined at the Richland County detention center. He died at the detention center four days later. In June 1996, petitioner Susan Jinks, acting as the personal representative of her husband's estate, brought suit against respondent Richland County and two individual defendants in federal district court under 42 U.S.C. 1983. Petitioner also alleged supplemental state-law claims of outrage and negligence under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 *et seq.* (Law. Co-op. 2002). Pet. App. 3a.

On November 20, 1997, the district court entered summary judgment for the defendants on the Section 1983 claims. See Pet. App. 21a. On December 3, 1997, the district court issued an additional order stating that "[s]ince all federal claims in this action have been resolved, this Court declines to exercise jurisdiction

over the remaining state claims." *Id.* at 21a-22a. The court therefore dismissed those claims without prejudice pursuant to 28 U.S.C. 1367(c)(3). Pet. App. 22a.[4]

b. In December 1997, sixteen days after the federal district court dismissed the state-law claims, petitioner filed suit in state court against respondent and the detention center physician, asserting her state-law claims. Pet. App. 3a. Respondent argued that the claims against it were barred by the two-year statute of limitations established by the South Carolina Tort Claims Act. See *ibid.* The trial court rejected that contention on the basis of Section 1367(d), and the jury ultimately rendered a verdict of $80,000 in petitioner's favor for wrongful death. See *id.* at 2a, 11a.

The Supreme Court of South Carolina reversed. Pet. App. 2a-10a. The state supreme court recognized that, under Article III and the Necessary and Proper Clause, U.S. Const. Art. I, § 8, Cl. 18, Congress has the power to regulate practice and procedure in federal courts. See *id.* at 5a-6a. The court also held that, as a general matter, the tolling provision in 28 U.S.C. 1367(d) is a constitutionally "necessary" means of regu-

---

[4] The court of appeals eventually affirmed the district court's grant of summary judgment with respect to petitioner's Section 1983 claims. Pet. App. 13a-20a. The court held that petitioner could not establish a violation of the Eighth Amendment because the evidence, taken in the light most favorable to her claims, was insufficient to show that respondent acted with deliberate indifference or reckless disregard for Carl Jinks's medical needs. Pet. App. 16a-18a. The court also agreed with the district court that "the only standards to which [petitioner] appeals are South Carolina state standards, which, as standards grounded in state law, cannot form the basis for an allegation that federal constitutional rights were violated." *Id.* at 18a (footnote omitted).

lating federal court practice. See Pet. App. 6a-7a. The court explained that Section 1367(d)

> affects federal practice as it allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis is determined not to exist. It governs federal practice and procedure as it eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court. Section 1367(d) is a useful "aid to the exercise of federal jurisdiction," and, therefore, is "necessary" within the meaning of the Necessary and Proper Clause.

Id. at 7a (footnote omitted).

The court concluded, however, that "as applied to the States and their political subdivisions in tort actions, passage of § 1367(d) is not 'proper' within the meaning of the Necessary and Proper Clause. In these circumstances, the tolling provision interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." Pet. App. 7a. The court explained that the State's Tort Claims Act "provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against the State and its political subdivisions." *Id.* at 9a. The court found that Section 1367(d) "potentially exposes political subdivisions to litigation and liability after the limitations period established by the State has expired * * *, thereby interfering with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause." *Ibid.*

The Supreme Court of South Carolina recognized that its decision might have the practical effect of

deterring a plaintiff from filing suit in federal court against one of the State's political subdivisions. Pet. App. 9a. The court "conclude[d], however, that a party's ability to choose its forum should not prevail over the State's sovereign authority to establish the terms under which its political subdivisions may be sued." *Id.* at 9a-10a. The court also observed that, even under its ruling, a plaintiff would retain the ability "to prosecute one action joining all federal and state law claims" by bringing suit in state court. *Id.* at 10a.

SUMMARY OF ARGUMENT

A. The provisions of 28 U.S.C. 1367(a) and (c), which govern a federal district court's exercise of jurisdiction over state-law claims that are pendent to a federal cause of action, are a valid exercise of Congress's authority to define the jurisdiction of the federal courts. This Court's decisions make clear that a "case" may arise under federal law even if some individual claims rest on state law, and that the federal judicial power under Article III extends to the adjudication of the entire "case." Both the basic grant of pendent-claim jurisdiction contained in Section 1367(a), and Section 1367(c)'s catalogue of circumstances in which a federal court may decline to adjudicate pendent state-law claims, are patterned closely on the judge-made rules that governed before the enactment of Section 1367. Those judge-made rules precluded the exercise of federal-court jurisdiction over pendent state-law claims against a nonconsenting State, but imposed no limits on similar claims against counties and municipalities. Likewise, Section 1367(a) and (c) apply to counties and municipalities in the same way they apply to non-governmental defendants. Taken together, Section 1367(a) and (c) reflect Congress's effort to strike an

appropriate balance between the efficient resolution of related federal- and state-law claims comprising a single "case," and the avoidance of unnecessary state-law rulings by the federal courts.

B. The statutory provision at issue in this case, 28 U.S.C. 1367(d), is integral to preserving the balance of interests accomplished by Section 1367(a) and (c). Section 1367(d) ensures that a plaintiff can exercise his federal rights to seek federal-court review of a federal cause of action, and to join related state-law claims in a single judicial proceeding, without putting at risk his ability to prosecute his state-law claims to their conclusion. Section 1367(d) also ensures that federal district courts, in deciding whether to retain jurisdiction over pendent state-law claims pursuant to 28 U.S.C. 1367(a), may apply the criteria set forth in Section 1367(c) free from concern that the state-law claims might be dismissed as time-barred if they are refiled in state court.

The tolling rule in Section 1367(d) is a permissible means of achieving Congress's objectives. Section 1367(d) is minimally intrusive on state prerogatives, since it preserves a plaintiff's state-law claim only if that claim is asserted in federal court within the limitations period prescribed by *state law*. Congress's authority to preempt state law, and to require state courts to enforce federal rights, is well settled. Most specifically, this Court's decision in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), establishes that Congress may require state courts to apply a federal tolling rule in adjudicating state-law causes of action, where preemption of the otherwise-applicable state-law rule is a "necessary and proper" means of carrying into effect Congress's enumerated powers.

C. Section 1367(d) is constitutional as applied to state-law claims against local governments. Counties and municipalities have no constitutional immunity from private suits authorized by Congress, and applying Section 1367(d) to such defendants raises no constitutional difficulties. Moreover, the considerations that generally underlie Section 1367(d) apply with full force to suits against local governments. In the present case, the South Carolina Supreme Court's refusal to enforce the federal tolling provision caused petitioner to forfeit her state-law claims as a consequence of exercising her federal rights—precisely the hardship that Section 1367(d) was intended to prevent.

This Court's decision in *Raygor* reinforces the conclusion that Section 1367(d) may properly be applied to respondent. While acknowledging that the language of Section 1367(d) is broad, the Court in *Raygor* nonetheless refused to conclude that Section 1367(a) and (d) apply to nonconsenting States. The Court in *Raygor* recognized that the States generally enjoy a constitutional immunity from private suits, and it relied on the interpretive rule that, absent clear evidence of congressional intent, federal statutes will not be read to authorize private suits against States and state agencies. That presumption does not apply to counties and municipalities. Application of Section 1367(d) to respondent neither raises constitutional concerns nor upsets the federal-state balance. Therefore, the broad language of Section 1367(d) applies fully to respondent.

ARGUMENT

THE TOLLING PROVISION OF 28 U.S.C. 1367(d) IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO STATE-LAW CLAIMS ASSERTED AGAINST A UNIT OF LOCAL GOVERNMENT

A. The Supplemental Jurisdiction Provisions Of 28 U.S.C. 1367(a) And (c) Are A Valid Exercise Of Congress's Authority To Define The Jurisdiction Of The Federal Courts

The South Carolina Supreme Court did not cast doubt on the constitutionality of 28 U.S.C. 1367(a) and (c), which govern a federal district court's exercise of jurisdiction over state-law claims that are pendent to a federal cause of action. The validity of those provisions cannot reasonably be questioned. Nor is there any basis for suggesting that those provisions would not apply to suits against a county or municipal defendant—whether consenting or not.

1. Under Article III of the Constitution, the judicial power to decide "cases" arising under federal law extends to the resolution of state-law claims that are related to the federal cause of action

Under Article III, Section 2 of the Constitution, the federal "judicial Power" extends to, *inter alia*, "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." As this Court's decisions make clear, a "Case" may "aris[e] under" the Constitution and laws of the United States even if some individual claims are founded on state law; and the federal "judicial Power" extends to the entire "Case" as so defined. *Gibbs*, 383 U.S. at 725. "The state and federal claims must derive from a common nucleus of operative fact. But if, considered without

regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Ibid.*

Under 28 U.S.C. 1367(a), the basic power of the federal district courts to exercise jurisdiction over pendent state-law claims is defined by express reference to that constitutional standard. Thus, the statute provides that "in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. 1367(a). This Court's decisions make clear that Section 1367(a)'s grant of authority to resolve pendent state-law claims is constitutional. Consistent with its earlier holding that the Eleventh Amendment precludes a federal court from adjudicating pendent state-law claims against nonconsenting States, see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 120 (1984), this Court in *Raygor* held that Section 1367(a) does not extend to claims against nonconsenting state defendants. See 122 S. Ct. at 1005. But there is no basis for questioning Section 1367(a)'s application to counties or municipalities.

2. In 28 U.S.C. 1367(a) and (c), Congress sought to promote the efficient resolution of suits raising related federal-and state-law claims, while avoiding unnecessary state-law rulings by the federal courts

Section 1367(c) identifies various circumstances in which a federal district court may decline to adjudicate a pendent state-law claim even though the case as a whole satisfies the requirements of Section 1367(a). Of particular relevance to this case, Section 1367(c)(3) authorizes the court to dismiss the pendent claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. 1367(c)(3). The provisions of Section 1367(c) are not constitutionally compelled. Congress reasonably determined, however, that the district courts should not be required to adjudicate pendent state-law claims in every circumstance in which Article III would permit the exercise of federal judicial power. Section 1367(c) is consistent both with the *Gibbs* Court's general observation that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," 383 U.S. at 726, and with the specific factors identified by the Court as particularly relevant to the appropriate exercise of that discretion, see *id.* at 726-727. Compare, *e.g.*, 28 U.S.C. 1367(c)(3) with *Gibbs*, 383 U.S. at 726 ("if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well").

Taken together, 28 U.S.C. 1367(a) and (c) reflect Congress's effort to balance federal and state interests and to assist litigants in achieving just and expeditious resolution of their disputes. Section 1367(a) reflects Congress's determination that, as a general matter, federal-and state-law claims should be tried together if they are sufficiently related so as to comprise a single Article III "case." At the same time, Congress recog-

nized that in some circumstances questions of state law are more appropriately remitted to state tribunals, notwithstanding the presence, at least at the outset of the litigation, of a related federal claim.[5] Permitting dismissal of state-law claims in the circumstances identified in Section 1367(c) avoids undue intrusion on state-court prerogatives, and it furthers the litigants' interest in obtaining resolution of their dispute by the judges having greatest familiarity with the governing law. Compare *Gibbs*, 383 U.S. at 726 ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.").

B. The Tolling Provision Of 28 U.S.C. 1367(d) Is Valid As A Measure "Necessary And Proper" To Achieve The Objectives Of The Related Provisions Defining The Pendent-Claim Jurisdiction Of The Federal Courts

1. Section 1367(d) preserves the balance struck in Section 1367(a) and (c) between efficient resolution of related claims and avoidance of unnecessary state-law rulings by the federal courts

The statutory provision at issue in this case, 28 U.S.C. 1367(d), states that, upon the federal court's dismissal of a pendent claim asserted under Section

---

[5] Proponents of the supplemental jurisdiction statute urged that the statute be drafted to encourage district courts to dismiss state-law claims that would more appropriately be heard in state court. For example, Judge Joseph F. Weis, Jr., the chairman of the Federal Courts Study Committee, recommended that "when a state claim predominates, the district court should be authorized and encouraged to decline the exercise of supplemental jurisdiction," because "[t]o proceed in the face of state claim predominance would be an affront by a district court to considerations of comity and federalism." *House Hearing* 95.

1367(a), the applicable limitations period "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. 1367(d). The purpose of Section 1367(d) is to remove any artificial disincentive for plaintiffs to file suit in federal court. Section 1367(d) achieves that objective by ensuring that, if a plaintiff's federal-court complaint (including a pendent state-law claim) is filed within the time period allowed by state law for asserting the state-law claim standing alone, the statute of limitations on the pendent claim will not expire during the pendency of the federal-court action. In the event that the state-law claims are dismissed under Section 1367(c), Section 1367(d) holds the plaintiff harmless for invoking federal jurisdiction by allowing the state-law claim to be refiled in state court without being deemed untimely.

Section 1367(d) plays an integral role in ensuring that the balancing of interests accomplished by Section 1367(a) and (c) can operate as Congress intended. Absent the tolling provision, a plaintiff who wished to assert federal-and state-law claims that "derive from a common nucleus of operative fact," *Gibbs*, 383 U.S. at 725, would be forced to choose one of three undesirable options. First, if the plaintiff filed a single federal-court action, invoking the court's pendent-claim jurisdiction under 28 U.S.C. 1367(d), he would run the risk that his state-law claim would be treated as time-barred in state court if the claim were dismissed by the federal court for one of the reasons set forth in Section 1367(c).[6] Second, as the South Carolina Supreme Court

[6] Moreover, to ameliorate the inequity of that result, federal courts might be tempted to retain jurisdiction in cases better left for the state courts. See pp. 24-25, *infra*.

suggested, the plaintiff could "prosecute one action joining all federal and state law claims" by "bring[ing] the action in state court." Pet. App. 10a. By proceeding in that manner, however, the plaintiff would forgo his right to bring his federal claim before a federal forum. Third, if the plaintiff filed separate actions in state and federal courts, the state action might be deemed barred by claim-splitting rules; or the judgment in that suit (if it was allowed to go forward) might precede the resolution of the federal-court action and be given preclusive effect with respect to the disposition of the federal claim. Even if the plaintiff were permitted to litigate each of the two actions to its conclusion, the process would waste the resources of the parties and the courts, and the plaintiff would be denied the right conferred by Section 1367(a) to litigate the entire case in a single federal forum.

Thus, Section 1367(d) ensures that a plaintiff can exercise his *federal* rights to (1) seek federal-court review of a federal cause of action (a right guaranteed, in this case, by 42 U.S.C. 1983 and 28 U.S.C. 1331) and (2) join related state-law claims in a single judicial proceeding (a right guaranteed by 28 U.S.C. 1367(a)), without putting at risk his ability to prosecute his state-law claims to their conclusion. Under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, a State would be foreclosed from *expressly* conditioning the availability of a state-law cause of action on a plaintiff's agreement to forgo the exercise of federal rights. In *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239-240 (1967), for example, this Court held that the State of Florida could not deny unemployment compensation to persons who had filed unfair labor practice charges with the National Labor Relations Board. The Court explained that "Florida should not be permitted to

defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan." *Id.* at 239; see *Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532 (1922) ("a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege because of its exercise of such right"). Similarly here, South Carolina could not make the remedies provided by the State's Tort Claims Act unavailable to persons who file suit in federal court under 42 U.S.C. 1983. Section 1367(d) serves to ensure that the application of state tolling rules does not indirectly produce the same practical effect.

Section 1367(d) also ensures that federal district courts, in deciding whether to retain jurisdiction over pendent state-law claims pursuant to 28 U.S.C. 1367(a), may apply the criteria set forth in Section 1367(c) free from concern that the state-law claims might be dismissed as time-barred if they are refiled in state court. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dismissed claim from refiling."); Denis McLaughlin, *supra*, 24 Ariz. St. L.J. at 983 (Section 1367(d) gives federal courts "the freedom to properly determine the issue of discretionary dismissal solely on the basis of the factors of § 1367(c)"). The possibility that federal district courts might retain jurisdiction over claims that would more appropriately

be litigated in state court, simply to ensure that the plaintiff is not deprived of all judicial redress, is more than theoretical. Before Section 1367(d) was enacted, federal courts frequently and explicitly invoked the possibility that pendent state-law claims might otherwise be time-barred as a factor—even a dispositive factor supporting retention of jurisdiction. See pp. 5-6, *supra*. By removing an artificial disincentive to the dismissal of state-law claims, Section 1367(d) promotes the proper exercise of federal jurisdiction and helps to preserve the balance struck in Section 1367(a) and (c) between the efficient resolution of federal-and state-law claims comprising a single constitutional "case," and the avoidance of "[n]eedless decisions of state law" (*Gibbs*, 383 U.S. at 726) by the federal courts.

2. Section 1367(d) is a constitutionally permissible means of achieving Congress's objectives

a. The Constitution authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. U.S. Const. Art. I, § 8, Cl. 18. Under the classic formulation of the authority conferred by the Necessary and Proper Clause, so long as the congressional end is legitimate, "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see, *e.g.*, *Graham* v. *John Deere Co.*, 383 U.S. 1, 6 (1966) ("Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."). Because it promotes the proper exercise of federal jurisdiction and furthers the effective operation of the overall scheme established by

28 U.S.C. 1367(a) and (c), Section 1367(d) is a law "necessary and proper for carrying into Execution" Congress's power "[t]o constitute Tribunals inferior to the supreme Court" (U.S. Const. Art. I, § 8, Cl. 9) and to define their jurisdiction within the limits imposed by Article III.[7]

b. Section 1367(d) is minimally intrusive on the State's authority to determine the time and manner in which litigation in the State's courts will be conducted. The tolling provision will preserve a plaintiff's state-law claim only if that claim is asserted in federal court within the limitations period prescribed by *state* law. Thus, Section 1367(d) in no way interferes with the primary function of a statute of limitations—*i.e.*, to ensure that a defendant will know within a specified period whether he has been sued on a particular claim.

---

[7] In cases (like this one) in which the jurisdiction of the federal district court in the initial suit is premised on a federal statutory cause of action, Section 1367(d) might also be viewed as a means "necessary and proper" to execute the constitutional grant of authority on which the substantive federal statute is based. Congress's authority under Section 5 of the Fourteenth Amendment (for example) includes not only the power to enact 42 U.S.C. 1983 in the first instance, but also the power to preempt state laws that would penalize or deter individuals in their exercise of rights under Section 1983. Cf., *e.g.*, *Felder* v. *Casey*, 487 U.S. 131 (1988) (state procedural rule held preempted as applied to actions brought in state court under Section 1983). By ensuring that plaintiffs who file Section 1983 actions in federal court are not thereby deprived of avenues of redress otherwise available to them under state law, 28 U.S.C. 1367(d) (as applied in this case) complements and effectuates Section 1983. In its present application, Section 1367(d) may thus be regarded as a "necessary and proper" means of executing Congress's authority under Section 5 of the Fourteenth Amendment, as well as a "necessary and proper" means of carrying into effect Congress's power to establish inferior federal courts and to define their jurisdiction.

See *ALI Study* 454 (principal purposes of a statute of limitations "are amply served by the commencement of an action in a federal court, even if it is ultimately determined that the court lacked jurisdiction"); cf. *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944) (rationale for statutes of limitations "is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them").

c. Section 1367(d) does interfere with state policy choices to a degree, by requiring that the applicable limitations period be tolled during the period that the state-law claim is pending before the federal court (and for 30 days thereafter), even if state law would prescribe a different result. It is well established, however, that federal preemption of state law generally presents no Tenth Amendment problem. Although "congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits of no other result." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). It is equally clear that state courts may be required to apply federal law. "Federal law is enforceable in state courts" because "the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett* v. *Rose*, 496 U.S. 356, 367 (1990); accord *New York* v. *United States*, 505 U.S. 144, 178-179 (1992)

("[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause").

The obligation of state courts under the Supremacy Clause extends beyond the duty faithfully to apply federal law in cases that the state court has *chosen* to adjudicate. Under some circumstances, the Supremacy Clause requires in addition that a state court resolve a claim over which it would prefer to decline jurisdiction. "[W]here the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Minneapolis & St. Louis R.R.* v. *Bombolis*, 241 U.S. 211, 222 (1916); accord, *e.g.*, *Howlett*, 496 U.S. at 369-381; *Testa* v. *Katt*, 330 U.S. 386, 389-394 (1947); *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 57-58 (1912). Thus, the fact that Section 1367(d) requires state courts to entertain some suits that they would otherwise decline to adjudicate (at least at that time) does not render the law invalid.

Most specifically, this Court's decision in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), establishes that Congress may, in appropriate circumstances, require state courts to apply a federal tolling rule in adjudicating state-law causes of action. The federal law at issue in *Stewart* was enacted in 1864 and provided that applicable limitations periods in civil and criminal cases would be tolled for the period during which the actions could not be prosecuted because of the Civil War. See

id. at 494, 504-505. The case involved a contract action filed in Louisiana state court. *Id.* at 500-501. This Court first held that the statute applied to actions brought in state as well as federal courts. See *id.* at 505-506. The Court then rejected the argument that the law, so construed, exceeded Congress's authority under the Constitution. See *id.* at 506-507.

In sustaining the validity of the federal tolling provision, this Court observed that "Congress is authorized to make all laws necessary and proper to carry into effect the granted powers." 78 U.S. (11 Wall.) at 506. The Court concluded that Congress's war power "carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections." *Id.* at 507. The Court rejected the defendant's contention that "as to matters not intrusted to the government of the United States, the State courts are considered as courts of another sovereignty. As Congress cannot create the State courts, as it cannot establish the ordinary rules of property, obligations, and contracts, * * * it cannot prescribe rules of proceeding for such State courts." *Id.* at 498 (footnote omitted) (argument of counsel). The Court's decision in *Stewart* makes clear that Congress possesses constitutional authority to preempt the tolling rules that would otherwise govern state-law causes of action filed in state court, where such preemption is a "necessary and proper" means of carrying into effect Congress's enumerated powers.

When the American Law Institute recommended the enactment of a tolling rule (see p. 10 & note 3, *supra*) similar to the provision later enacted as Section 1367(d),

it invoked *Stewart* as authority for the constitutional validity of its proposal. See *ALI Study* 454; cf. pp. 10-11, *supra*. The *ALI Study* also explained that Congress had tolled the statutes of limitations pertaining to railroads during the period of federal control during World War I, and pertaining to servicemen during both World Wars, and that the lower federal and state courts had sustained those provisions. See *ALI Study* 454 & nn. 2, 3 (citing cases). Indeed, the Soldiers' and Sailors' Civil Relief Act of 1940 continues to provide that "[t]he period of military service shall not be included in any period now or hereafter to be limited by any law, regulation, or order for the bringing of *any action* or proceeding *in any court* * * * by or against any person in military service." 50 U.S.C. App. 525 (emphasis added).

The tolling statutes described above have served to carry into effect Congress's Article I war powers, which are not implicated by Section 1367(d). But as the *ALI Study* explained, "every power granted to the federal government carries with it a large measure of discretion as to the selection of means appropriate to its exercise." *ALI Study* 455. Congress's general constitutional authority to prescribe the jurisdiction of the federal courts (and, as relevant in this case, to provide a cause of action to redress constitutional violations committed by persons acting under color of state law, see note 7, *supra*) amply supports the enactment of Section 1367(d). That provision serves to ensure that federal courts may exercise their discretion under Section 1367(c) without reference to the litigants' state-court rights, and that petitioner's exercise of a federal right does not subject him to the loss of rights conferred by state law.

The tolling provision contained in Section 1367(d), moreover, is considerably narrower than the statutes

that Congress has previously enacted under its war powers. The tolling period mandated by Section 1367(d) commences only when the defendant is notified, by the filing of the federal-court action, that litigation against it has commenced. Cf. *ALI Study* 455. The provision is thus "a far cry from notifying a person of a lawsuit for the first time long after the governing statute of limitations has run—a measure that may be justified by the existence of a national emergency but that is not called for or appropriate" to ensure the effective operation of the federal supplemental jurisdiction statute. *Ibid.*

C. Section 1367(d) Is Constitutional As Applied To State-Law Claims Against A County Defendant

The Supreme Court of South Carolina did not question the constitutionality of Section 1367(d) as it applies to suits against private defendants. The court "conclude[d], however, that, as applied to the States and their political subdivisions in tort actions, passage of § 1367(d) is not 'proper' within the meaning of the Necessary and Proper Clause." Pet. App. 7a. The court explained that in its view, "the tolling provision interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Ibid.*; see *id.* at 9a ("in tort actions against political subdivisions, § 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause"). This Court, however, has already held in *Raygor* that Section 1367(a) and (d) do not even apply to suits against nonconsenting States

or (as in *Raygor* itself) arms of the State.[8] Accordingly, the decision below establishes a special exception from the operation of a federal statute for counties and municipalities based on principles of South Carolina law. The state court's analysis is misconceived.

1. Local governments have no constitutional immunity from private suits authorized by Congress

Whether and to what extent respondent and other local governmental bodies enjoy "sovereign immunity" as a matter of *state* law is for South Carolina officials to decide. However, counties and municipalities have no immunity as a matter of *federal* law from such private suits as Congress chooses to authorize. An "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden* v. *Maine*, 527 U.S. 706, 756 (1999); see, *e.g.*, *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368-369 (2001) (although cities and counties are state actors for Fourteenth Amendment purposes, "the Eleventh Amendment does not extend its immunity to units of local government"); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274,

[8] While state law informs the inquiry, the determination whether a particular governmental entity is an arm of the State for federal immunity purposes presents a question of federal law. *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429 n.5 (1997). Although the opinion below refers to respondent loosely as a "political subdivision" (see Pet. App. 9a, 10a), it is clear that respondent, as a county, does not constitute an arm of the State for federal immunity purposes. By allowing state immunity principles to trump federal law, the Supreme Court of South Carolina committed an error analogous to that corrected by this Court in *Howlett*. Compare *Howlett*, 496 U.S. at 375-379.

280 (1977) ("The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances, * * * but does not extend to counties and similar municipal corporations.") (citations omitted).

The South Carolina Supreme Court's reference to "the State's sovereign authority to establish the terms under which its political subdivisions may be sued" (Pet. App. 9a-10a) thus posits a constraint on *federal* power that does not exist. Because respondent has no federal constitutional immunity, its susceptibility to private suits is subject to congressional control, notwithstanding the contrary preferences of state officials. As a general matter, of course, state rather than federal law defines the conditions under which local governments may be sued in state court on state-law causes of action. That is equally true, however, of state-law claims against private defendants: Congress rarely has occasion to address the manner in which such litigation is conducted in the state courts. But when Congress reasonably concludes that a federal rule governing some aspect of state-court proceedings is an appropriate means of protecting the federal-court jurisdictional scheme or furthering some other legitimate federal interest, Congress may require state courts to enforce the federal rule. Through ordinary operation of the Supremacy Clause, any contrary state law—including state-law immunity principles—must yield to the federal directive. Section 1367(d) reflects Congress's judgment that a limited exception to the state-law tolling rules that would otherwise govern is necessary to ensure the achievement of federal objectives. If Section 1367(d) is a permissible exercise of congressional authority as applied to private defendants (see pp. 21-31, *supra*), respondent and other local governments

have no distinct *federal* status that would render the law invalid as applied to them.

2. Congress's reasons for enacting Section 1367(d) apply with full force to suits against local governments

The rationales that generally underlie Section 1367(d) are fully applicable to suits against local governments. Because counties and municipalities have no constitutional immunity from private suits, Congress can and often does authorize such suits to be filed against local governments in federal court. In the present case, for example, it is undisputed that respondent was a proper defendant in petitioner's suit under 42 U.S.C. 1983, see *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978), and that petitioner's Section 1983 claim fell within the jurisdiction of the federal district court. And because the applicability of Section 1367(a) to suits against local governments cannot plausibly be disputed, petitioner was entitled to bring her related state-law claims as part of the federal-court action. The South Carolina Supreme Court's refusal to enforce the federal tolling provision caused petitioner to forfeit her state-law claims as a consequence of exercising her federal rights—precisely the hardship that Section 1367(d) was intended to prevent.

3. The Court's decision in* Raygor *supports the application of Section 1367(d) to counties and municipalities

In *Raygor*, this Court held, as a matter of statutory construction, that neither Section 1367(a)'s grant of pendent-claim jurisdiction nor Section 1367(d)'s tolling provision applies to claims against nonconsenting States that are dismissed on Eleventh Amendment grounds. 122 S. Ct. at 1005-1007; see pp. 11-12, *supra*.

Respondent contends (Br. in Opp. 2, 4) that the South Carolina Supreme Court's decision in this case is a "natural and logical extension" of the holding in *Raygor*. That argument ignores both the specific reasoning of the Court's *Raygor* decision and the critical differences between States and counties.

In *Raygor*, this Court first held that, under the clear-statement rule of *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), Section 1367(a) does not apply to nonconsenting States. The Court explained that, despite the apparent breadth of Section 1367(a)'s grant of supplemental jurisdiction over "all civil actions," Section 1367(a)'s lack of any specific reference to state defendants precluded application of that provision to state-law suits against nonconsenting state entities. See 122 S. Ct. at 1005 (citing *Blatchford*). Only after finding Section 1367(a) inapplicable to claims against nonconsenting States did the Court consider whether, nonetheless, claims "asserted under § 1367(a) but subsequently dismissed on Eleventh Amendment grounds" fall within Section 1367(d)'s tolling provision. Here, by contrast, respondent does not and could not identify any reason why Section 1367(a) would not apply to counties and municipalities in the same manner it applies to non-governmental defendants. Because the provisions of Section 1367 that govern federal-court proceedings apply in the same manner to respondent as to private defendants, there is no reason why Section 1367(d) should apply differently (or raise any county-specific constitutional difficulties) when a pendent state-law claim is refiled in state court.

This Court in *Raygor* then held that Section 1367(d), like Section 1367(a), does not apply to state-law claims against nonconsenting States. In so holding, the Court relied on two well-established and closely related

principles: (a) that nonconsenting States generally enjoy a constitutional immunity from private suits (see 122 S. Ct. at 1005-1006), and (b) that, absent clear evidence of congressional intent, federal statutes will not be read either to authorize private suits against States and state agencies or to upset the federal-state balance (see *id.* at 1006). Neither of those principles assists respondent here. Counties and municipalities have no federal constitutional immunity from private suits. See pp. 32-33, *supra*. Nor does any clear-statement rule require Congress to refer specifically to local governments in order to authorize private suits against them. Compare *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989) (a State is not a "person" subject to suit under 42 U.S.C. 1983), with *Monell*, 436 U.S. at 683-689 (a city is a "person" subject to liability under Section 1983). Likewise suits against local governments do not implicate the same federalism concerns as suits against nonconsenting States. See *Will*, 491 U.S. at 67 n.7, 70.

CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
PAUL D. CLEMENT
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
Attorneys

DECEMBER 2002

Supreme Court U.S.
FILED
JAN 15 2003
OFFICE OF THE CLERK

No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR RESPONDENT

ANDREW F. LINDEMANN
Counsel of Record
WILLIAM H. DAVIDSON, II
DAVID L. MORRISON
DAVIDSON, MORRISON AND
LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, SC 29202
(803) 806-8222

Attorneys for Respondent

178399

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d), the tolling provision of the federal supplemental jurisdiction statute, is constitutional as applied to a political subdivision of a State where the statute enlarges the State's limited waiver of sovereign immunity under state law for itself and its political subdivisions.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Constitutional and Statutory Provisions	1
Statement of the Case	2
Summary of Argument	3
Argument	7
I. The Application Of Section 1367(d) To A Political Subdivision Of The State Of South Carolina Exceeds Congress' Authority Under Article III And Contravenes The Tenth Amendment.	7
A. In enacting Section 1367(d), Congress lacked the power to abrogate the respondent's sovereign immunity under state law from state claims litigated in a state court.	8
B. Congress' attempt to alter the application of a state law statute of limitations to be applied in state courts to state law claims represents an unconstitutional intrusion upon state sovereignty.	17

Contents

	Page
C. The case law on which the petitioner and the United States rely to support the constitutionality of Section 1367(d) is readily distinguishable and does not suggest that Congress has the power to abrogate state law sovereign immunity as applied in a state law claim litigated in a state court.	22
D. The existence of other federal tolling statutes or the power to stay certain state court proceedings does not provide support for Congress' exercise of its Article III powers in enacting Section 1367(d).	26
E. Contrary to the petitioner's assertions, the ruling below will not bar or discourage civil rights litigants from prosecuting their claims.	28
F. The decision of the court below does result in a violation of due process and does not discriminate against litigants asserting federal constitutional rights.	30
II. The Lack Of A Clear Statement By Congress Of Its Intent For Section 1367(d) To Apply To States And Their Political Subdivisions Allows This Court To Avoid The Constitutional Question Ruled Upon By The Court Below.	32
Conclusion	35

TABLE OF CITED AUTHORITIES

Page

Cases:

Alden v. Maine, 527 U.S. 706 (1999) 9, 13, 14, 15

Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) 29

Blinn v. Florida Department of Transportation, 781 So. 2d 1103 (Fla. Ct. App. 2000) 11

Block v. North Dakota, 461 U.S. 273 (1983) 4, 9, 10

Board of Regents v. Tomanio, 446 U.S. 478 (1980) .. 18

Burnett v. New York Central Railroad Co., 380 U.S. 424 (1965) 23

Employees v. Missouri Public Health & Welfare Dept., 411 U.S. 279 (1973) 30

Erie Railway Co. v. Tompkins, 304 U.S. 64 (1938) 20, 21, 22, 24

Estate of Fennell v. Stephenson, 137 N.C. App. 430, 528 S.E.2d 911 (2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (2001) 11

Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807) ... 19

Federal Maritime Commission v. South Carolina Ports Authority, 535 U.S. 743 (2002) 14, 15

Page

Felder v. Casey, 487 U.S. 131 (1988) 13, 19

Gregory v. Ashcroft, 501 U.S. 452 (1991) 33

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) ... 20

Hanger v. Abbott, 73 U.S. 532 (1867) 24

Jinks v. McCaulley, 163 F.3d 598 (1998) 2

Kalb v. Feuerstein, 308 U.S. 433 (1940) 27

Lapides v. Bd. of Regents of the University System of Georgia, 535 U.S. 613 (2002) 32

M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839) .. 18

McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985) 8

Mondou v. New York, New Haven, & Hartford Railroad Co., 223 U.S. 1 (1912) 19

New York v. United States, 505 U.S. 144 (1992) ... 10, 11

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 23, 24

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 30, 32

Page

Printz v. United States, 521 U.S. 898 (1999) 11, 16

Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949) 20

Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002) 6, 9, 12, 31, 32, 33, 34

Stewart v. Kahn, 78 U.S. 493 (1870) 24, 25, 26

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 17, 18

United States v. Mottaz, 476 U.S. 834 (1986) 9

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) ... 20

Wilson v. Garcia, 471 U.S. 261 (1985) 20

United States Constitution:

U.S. Const. Art. I 6, 16, 25, 27, 28

U.S. Const. Art. III ..... *passim*

U.S. Const. amend. X ..... *passim*

U.S. Const. amend. XI ..... *passim*

U.S. Const. amend. XIV 16

Page

Statutes:

11 U.S.C. § 362(a) 27

28 U.S.C. § 1367 1

28 U.S.C. § 1367(d) ..... *passim*

42 U.S.C. § 1983 ..... 2, 13, 29

S.C. Code Ann. § 15-78-10, *et seq.* 1, 4, 8

S.C. Code Ann. § 15-78-100(a) 1, 3, 4, 9, 10

S.C. Code Ann. § 15-78-110 ..... 9, 17

Act of Congress from 1864 entitled "An Act In Relation To The Limitation Of Actions In Certain Cases," 13 Stat. 123 (1864) 24

Other Authority:

2 J. Kent, *Commentaries on American Law* 462 (2d ed. 1832) 18

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the United States Constitution as well as 28 U.S.C. § 1367 have been reproduced at Appendix F in the Petition for a Writ of Certiorari.

Moreover, certain provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (Supp. 2002), are reproduced in that same appendix. However, the South Carolina Supreme Court also cited S.C. Code Ann. § 15-78-100(a) in the decision below. That statute provides as follows:

> Section 15-78-100 When and where to institute action; requirement of special verdict specifying proportionate liability to multiple defendants
>
> (a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

STATEMENT OF THE CASE

The petitioner, Susan Jinks, as the Personal Representative of the Estate of Carl Jinks, brought a survival action and a wrongful death action against Richland County and Dr. Charles Eskridge. The claims arise out of the death of Carl Jinks on October 18, 1994, while incarcerated at the Richland County Detention Center.

The petitioner originally commenced an action in the United States District Court asserting federal constitutional claims under 42 U.S.C. § 1983 and supplemental state law claims. The respondent, Richland County, and other defendants filed motions for summary judgment in that action. By order entered on November 20, 1997, United States District Judge Matthew J. Perry, Jr. granted summary judgment for Richland County on the federal constitutional claims. An order dismissing the supplemental state law claims without prejudice was entered on December 3, 1997. Jinks then appealed to the Fourth Circuit Court of Appeals which affirmed the district court's rulings. *Jinks v. McCaulley*, 163 F.3d 598 (1998) (table). (Pet. App. A at 13a).

Following the dismissal of the supplemental state claims and while the federal appeal was pending, the petitioner filed an action in the Court of Common Pleas for Richland County. That action was filed on December 19, 1997, which was less than thirty days after the dismissal of the supplemental state law claims in the district court.

Following discovery, the case proceeded to trial before Judge L. Henry McKellar and a jury commencing on November 8, 1999. At the close of each side's case-in-chief, the respondent moved for a directed verdict. Those motions

were denied. The jury ultimately returned a defense verdict on the survival action for both defendants. The jury returned a defense verdict on the wrongful death action for Dr. Charles Eskridge. However, the jury returned a verdict of $80,000 actual damages in favor of the petitioner and against Richland County on the wrongful death action. The respondent thereafter filed post-trial motions, including a motion for judgment notwithstanding the verdict based upon a statute of limitations defense. Those motions were also denied by the trial judge.

An appeal was filed to the South Carolina Court of Appeals. The appeal was then certified for immediate review by the South Carolina Supreme Court. By its decision issued April 22, 2002, the South Carolina Supreme Court reversed the trial court and ruled that the petitioner's negligence claim was barred by the two-year statute of limitations under the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-100(a) (Supp. 2002). The court concluded that the tolling provision set forth in 28 U.S.C. § 1367(d) as applied to a political subdivision such as Richland County was unconstitutional.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court ruled that the extension of the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), to a political subdivision of the State of South Carolina was beyond the powers delegated to Congress under Article III in conjunction with the Necessary and Proper Clause. As a result, Section 1367(d) contravenes principles of state sovereignty protected by the Tenth Amendment.

The analysis applied by the court below is correct. Article III does not provide an explicit source of power authorizing Congress to extend Section 1367(d) to claims against a political subdivision of the State of South Carolina. Under South Carolina state law, of which the court below is the final arbiter, a political subdivision such as the respondent is entitled to sovereign immunity originally derived from English common law and presently codified in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq*. (Supp. 2002). In enacting the Tort Claims Act, the South Carolina General Assembly waived state law sovereign immunity for the State and its political subdivisions with certain exceptions, limitations, and conditions. One of the conditions on this limited waiver requires that a state court action for damages "must be brought within two years of the date of loss." *See* S.C. Code Ann. § 15-78-100(a) (Supp. 2002). This Court has held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Therefore, as held by the court below, once the limitations period under the Tort Claims Act expired, the respondent was entitled to absolute sovereign immunity under state law.

Section 1367(d) allowed for the petitioner to commence her state law claims against the respondent in state court beyond the two-year prescribed period and at a time where the respondent enjoyed absolute sovereign immunity under state law. Section 1367(d), therefore, resurrected a purely state law claim that was otherwise barred under state law. This result represents an unconstitutional intrusion on state sovereignty. Congress lacks the authority under Article III and the Necessary and Proper Clause to abrogate the sovereign immunity enjoyed by a State and its political subdivisions under state law and as applied to a state law claim litigated in a state court.

The petitioner and the United States disregard the fact that the two-year limitations period established by the Tort Claims Act creates not only the deadline for filing an action but also sets the parameters for a limited waiver of state law sovereign immunity. They contend that the respondent is not entitled to federal constitutional sovereign immunity under the Eleventh Amendment; however, this case does not involve an action brought in federal court with federal claims. The sovereign immunity claimed by the respondent is derived from state law and is asserted only with respect to state law claims litigated in state courts. The Eleventh Amendment, therefore, has no bearing on the issue before this Court and does not preclude the respondent from asserting the unconstitutional intrusion on state sovereignty effected by Section 1367(d) in this case.

The South Carolina Supreme Court did not reach the broader issue as to whether Congress has the power under Article III and the Necessary and Proper Clause to alter a statute of limitations established under state law and applicable to a state law claim only. Nonetheless, the respondent submits that Congress is not delegated authority under Article III to alter or amend any state statute of limitations. Article III authorizes Congress to regulate the jurisdiction and establish the procedures for "inferior courts"; however, historically this Court has not treated state courts as "inferior courts" within congressional control. Section 1367(d) is an attempt by Congress to effect practice and procedure in state courts. It compels state courts to entertain claims that would otherwise be barred by operation of state law. This attempt to commandeer the state courts represents an impermissible intrusion into state sovereignty and is in violation of the Tenth Amendment.

The utility of Section 1367(d) in allowing for federal courts to dismiss state supplemental claims without concern for a potential statute of limitations defense is no basis for trampling principles of state sovereignty. Likewise, the existence of other federal tolling statutes does not compel a broad reading of Congress' Article III powers particularly where the other statutory schemes were enacted under Article I authority. Finally, the petitioner's claim that the ruling below somehow effects a due process violation or raises other similar constitutional infirmities is also unavailing. The system of dual federalism in this nation creates a framework where a litigant's choice of forum, as a practical matter, can be limited. That limitation, however, does not cause any constitutional deprivation. Even where Section 1367(d) is not applicable to States and their political subdivisions, a civil rights plaintiff still retains the ability to seek relief in federal court, state court, or both.

The South Carolina Supreme Court made no attempt to avoid the constitutional issue presently before this Court. In a case decided last term, *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), the Minnesota Supreme Court had tackled a similar constitutional question. Yet, on appeal, this Court avoided the constitutional question by applying the clear statement rule of statutory construction to Section 1367(d). This Court has the same option available in this case. Section 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against any political subdivision such as the respondent. More specifically, there is no specific or unequivocal intent expressed in the statute to suggest that Congress intended to abrogate the sovereign immunity enjoyed by a political subdivision under state law and as applied to state law claims litigated in state court. Thus, as in *Raygor*, this Court may

resolve this case by concluding that Section 1367(d) is not applicable to nonconsenting States as well as nonconsenting political subdivisions of the States.

ARGUMENT

The South Carolina Supreme Court ruled that the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), is in violation of the Tenth Amendment as applicable to a political subdivision of the State of South Carolina. In ruling on the respondent's Tenth Amendment challenge, the South Carolina Supreme Court analyzed the source and scope of congressional authority and concluded that "Congress exceeded its constitutional authority in enacting § 1367(d) to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002). (Pet. App. A at 10a). The South Carolina Supreme Court was correct in its analysis.

I. THE APPLICATION OF SECTION 1367(d) TO A POLITICAL SUBDIVISION OF THE STATE OF SOUTH CAROLINA EXCEEDS CONGRESS' AUTHORITY UNDER ARTICLE III AND CONTRAVENES THE TENTH AMENDMENT.

Section 1367(d) represents a unique and troublesome intrusion by the federal government into a state's sovereign authority both to regulate the practice and procedure within its state courts but, more importantly, to govern the scope of governmental immunity for purely state law claims. Section 1367(d) raises legitimate questions of congressional authority under Article III and the Necessary and Proper Clause as well as questions of constitutionality under the Tenth Amendment.

A. In enacting Section 1367(d), Congress lacked the power to abrogate the respondent's sovereign immunity under state law from state claims litigated in a state court.

In enacting Section 1367(d) and sanctioning its application to state governmental entities such as the respondent, Congress impermissibly infringed upon state sovereignty. The petitioner and the United States focus strictly on whether Congress has the power to toll a state statute of limitations as applied to a state law claim in a state court. That is not the precise question at stake in this case. Because the defendant is a governmental entity, this case raises not only the question of whether Congress may toll a state statute of limitations, but more precisely, whether Congress has the power to expand a State's limited waiver of sovereign immunity for both a State and its political subdivisions.

As determined by the South Carolina Supreme Court, the two-year statute of limitations at issue is part and parcel of the waiver of sovereign immunity by the State of South Carolina for the State and its political subdivisions. As the court explained in the decision under review, all governmental entities in South Carolina enjoyed sovereign immunity until 1985. In that year, the South Carolina Supreme Court abolished sovereign immunity. *See McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). In response, the South Carolina General Assembly enacted the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (Supp. 2002), which reinstated and then waived sovereign immunity for the State and its political subdivisions with certain exceptions and limitations. "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against

the State and its political subdivisions." *Jinks*, 563 S.E.2d at 108. (Pet. App. A at 9a). In accordance with S.C. Code Ann. § 15-78-100(a), the Tort Claims Act requires that a state court action for damages "must be brought within two years of the date of loss." *Id.*[1] Thus, under South Carolina law, sovereign immunity for the State or a political subdivision is not waived unless the suit is filed within the prescribed two-year limitations period.

Last term in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), this Court explained:

> [W]ith respect to suits against a state sovereign in its own courts, we have explained that a State "may prescribe the terms and conditions on which it consents to be sued," and that "[o]nly the sovereign's own consent could qualify the absolute character of [its] immunity" from suit in its own courts.

534 U.S. at 543. (Citations omitted). In *Block v. North Dakota*, 461 U.S. 273 (1983), this Court held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." 461 U.S. at 287. *See also United States v. Mottaz*, 476 U.S. 834, 841 (1986) (citing *Block*); *Alden v. Maine*, 527 U.S. 706, 749 (1999) ("... the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself"). Thus, the two-year limitations period set forth in S.C. Code Ann.

---

1. In addition to S.C. Code Ann. § 15-78-100(a) which sets forth certain conditions for suit, S.C. Code Ann. § 15-78-110 sets forth a statute of limitations providing that the suit must be commenced within two years of the date of loss. The two statutory provisions are, in essence, identical in application.

§ 15-78-100(a) is not only a deadline for the filing of suit but more importantly is a limitation on the State's waiver of sovereign immunity for itself and its political subdivisions.

In the present case, the state court action was filed after the two-year limitations period had expired, and as a result, the respondent enjoyed sovereign immunity from suit when this action was filed. Thus, the effect of applying Section 1367(d) to a South Carolina governmental entity such as Richland County was to enlarge the State's limited waiver of sovereign immunity. Under the reasoning of *Block* and *Raygor*, that alone constitutes impermissible interference with state sovereignty in contravention of the Tenth Amendment.

The Tenth Amendment provides that "the powers not delegated to the United States, are reserved to the States respectively or to the people." *See* U.S. Const., Amend. X. The analysis to be applied has been viewed in two ways. This Court has examined in some cases whether Congress has acted in accordance with its delegated powers under Article I or some other affirmative grant of power. In other cases, the Court has examined whether a congressional enactment has intruded upon principles of state sovereignty. In *New York v. United States*, 505 U.S. 144 (1992), this Court observed:

> In a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state

> sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

505 U.S. at 156. Although the Tenth Amendment is "essentially a tautology," this Court must nonetheless carefully examine "whether an incident of state sovereignty is protected by a limitation" on powers delegated to Congress. 505 U.S. at 157.

Proponents of the constitutionality of 28 U.S.C. § 1367(d), including the petitioner and the United States in this case, have concluded that Congress possessed the power to enact the statute under Article III in conjunction with the Necessary and Proper Clause. *See Blinn v. Florida Department of Transportation*, 781 So. 2d 1103 (Fla. Ct. App. 2000) (review of this issue was not sought in Florida Supreme Court); *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (2001) (North Carolina Supreme Court did not address constitutionality of § 1367(d)). Under Article III, Congress was granted the power to establish the "inferior courts" of the federal judicial branch and to enact regulations establishing those courts' jurisdiction. However, Article III does not explicitly convey power to Congress to legislate procedural rules for state courts adjudicating purely state law claims. As a result, the proponents of Section 1367(d) are forced to rely upon the Necessary and Proper Clause, which this Court has previously described as "the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1999).

Proponents of Section 1367(d) may argue that Congress is only creating a procedural framework by which federal courts may decline to exercise supplemental jurisdiction. Nonetheless, the ultimate effect of Section 1367(d) is an unprecedented and unconstitutional expansion of congressional power over the States and their political subdivisions. Specifically, as discussed above, the application of Section 1367(d) against the States and their political subdivisions allows for the extension of a limited waiver of sovereign immunity, at least, in the case of the State of South Carolina and its political subdivisions. It represents not simply the tolling of a traditional statute of limitations but the enlargement of the time in which the State of South Carolina has agreed to waive its sovereign immunity not only for itself but also for its political subdivisions.

The respondent is cognizant of the fact that this Court in *Raygor*, *supra*, has ruled that Section 1367(d) has no application to the States. The *Raygor* Court explained that "although we have not directly addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, we can say that the notion at least raises a *serious constitutional doubt*." 534 U.S. at 543. (Emphasis added). Although this Court reserved judgment on the constitutionality of Section 1367(d) where the defendant is not a State, 534 U.S. at 547, the respondent submits that those same "serious constitutional doubts" are equally applicable where, as in the present case, the defendant is a political subdivision of a State.

The petitioner and the United States argue that, although Congress may not have the authority to waive a nonconsenting State's sovereign immunity in state court,

Congress does have that authority with respect to political subdivisions such as Richland County. They point to the following language from *Alden*, *supra*, where this Court wrote that an "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756. This reliance on *Alden* is misplaced. *Alden* did not address Congress' authority to allow a *state* law claim to be asserted against a State's political subdivision in a state court where state law sovereign immunity would bar the claim, which is precisely the issue here. Instead, *Alden* only teaches that Congress may authorize a *federal* law claim, in that case a Fair Labor Standards Act (FLSA) claim, to proceed against a lesser governmental entity in a state court regardless of whether the lesser governmental entity asserts sovereign immunity based upon state law principles.[2] In contrast, according to *Alden*, a FLSA claim against the State of Maine in its own courts is barred by principles of federal constitutional immunity.

Thus, the decision of the South Carolina Supreme Court in the case at bar is not in conflict with *Alden*. Neither the lower court's decision nor the respondent's position is premised on a claim of Eleventh Amendment immunity.

2. The case of *Felder v. Casey*, 487 U.S. 131 (1988), is distinguishable on a similar basis. In *Felder*, this Court ruled that a Wisconsin notice-of-claim statute did not apply to federal civil rights claims brought under 42 U.S.C. § 1983 even where such claims were filed in state court. The Court described the notice-of-claim statute as "a substantive condition on the right to sue governmental officials and entities," 487 U.S. at 152, and as a result, state substantive law could not alter the requirements to state a claim based solely on federal law.

Instead, the respondent contends that it is entitled to sovereign immunity derived under state law, and Congress has no authority to abrogate state law sovereign immunity as applied to purely state law claims litigated in state courts.

The position taken by the petitioner and the United States stems from a mistaken belief that sovereign immunity is the same as Eleventh Amendment immunity. They reason that Richland County, as a political subdivision, is not entitled to Eleventh Amendment immunity because it is not an arm of the State. Accordingly, as they maintain, Richland County cannot claim sovereign immunity in any context. That is clearly incorrect. As this Court discussed at length in *Alden*, Eleventh Amendment immunity "is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." 527 U.S. at 713. The Court further explained that:

> [A]s the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id. Thus, the scope and extent of federal constitutional immunity is not obviously limited to Eleventh Amendment immunity.[3]

3. In the recent case of *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002), this Court held that "States, upon ratification of the Constitution, did not (Cont'd)

Moreover, as this Court in *Alden* explains, sovereign immunity is a creature of the English common law; it long pre-dated the ratification of the Constitution. *See Alden*, 527 U.S. at 715 ("[w]hen the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts"). "[T]he doctrine that a sovereign could not be sued without its consent was universal in States when the Constitution was drafted and ratified." 527 U.S. at 715-16. Principles of sovereign immunity which pre-date the Constitution protected not just the arms of the State from suit by private parties, but protected all forms of government including lesser governmental entities. History does not support any notion that States were immune from suit while municipalities and counties were subject to suit by private parties without their consent. Thus, it is beyond reasonable dispute that local governmental entities, such as Richland County, enjoy sovereign immunity derived from the common law and more specifically existing state law.[4]

Thus, contrary to the positions taken by the petitioner and the United States, the absence of Eleventh Amendment immunity for local governmental entities is not dispositive of the issue before this Court. While Congress has the power

(Cont'd)
consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.' An integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits." 122 S. Ct. at 1870. (Citations omitted).

4. The United States acknowledges that "[w]hether and to what extent respondent and other local governmental bodies enjoy 'sovereign immunity' is a matter of *state* law is for South Carolina officials to decide." *See* U.S. Br. at 32.

under Article I and Section 5 of the Fourteenth Amendment in certain instances to waive a local governmental entity's sovereign immunity for claims brought under *federal* law, Congress cannot abrogate sovereign immunity as derived under state law and as applied strictly to *state* law claims. Yet, that is precisely what will occur if Section 1367(d) is applied to the respondent in this case; the limited waiver of sovereign immunity under *state* law and as applied strictly to *state* law claims will be extended beyond what the State of South Carolina provided for by its laws.

Moreover, the absence of Eleventh Amendment immunity does not imply that local governmental entities do not enjoy the protection of the Tenth Amendment. In *Printz v. United States*, 521 U.S. 898 (1999), this Court found certain provisions of the Brady Handgun Violence Prevention Act to be in violation of the Tenth Amendment. Specifically, the Court ruled unconstitutional those provisions "commanding state and *local law enforcement officers* to conduct background checks on prospective handgun purchasers." 521 U.S. at 902. (Emphasis added). In fact, the petitioners in *Printz* were local law enforcement officers. The Court thus found that the Tenth Amendment also preserved the sovereignty of local governments.

In ruling that the Brady Handgun Violence Prevention Act violated the Tenth Amendment, the *Printz* Court explained that a law is not "proper" where it "violates the principle of state sovereignty." 521 U.S. at 924. In the case at bar, the South Carolina Supreme Court ruled that Section 1367(d) was "necessary" as "an aid to the exercise of federal jurisdiction." *Jinks*, 563 S.E.2d at 107. (Pet. App. A at 7a).[5] Nonetheless,

5. Although the South Carolina Supreme Court found that Section 1367(d) was "necessary," the respondent does not concede (Cont'd)

because Section 1367(d) substantially intrudes upon state sovereignty by extending the State's limited waiver of sovereign immunity for political subdivisions, the tolling provision cannot be deemed "proper" within the context of the Necessary and Proper Clause. In sum, Section 1367(d) is in violation of the Tenth Amendment as applied against the respondent in this case, and there is no power delegated to Congress that permits the abrogation of the respondent's sovereign immunity under state law and as applied to state law claims litigated in state courts.

B. Congress' attempt to alter the application of a state law statute of limitations to be applied in state courts to state law claims represents an unconstitutional intrusion upon state sovereignty.

As indicated above, the two-year limitations period provided in the South Carolina Tort Claims Act is a limitation on the State's waiver of sovereign immunity for itself and its political subdivisions. That limitations period is also treated under state law as a traditional statute of limitations. *See* S.C. Code Ann. § 15-78-110 (Supp. 2002).

This Court has recognized that statutes of limitations have long been deemed to be "procedural restrictions fashioned by each jurisdiction for its own courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988). "The period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government,

(Cont'd)
that point. However, because Section 1367(d) is not "proper," that issue alone is dispositive of the statute's constitutionality in the present context.

consulting its own interest and convenience." *Id.*, *citing* 2 J. Kent, *Commentaries on American Law* 462-463 (2d ed. 1832). The Court has observed that "[s]tatutes of limitations are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). In *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839), this Court explained that "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property." 38 U.S. (13 Pet.) at 327.

Thus, a statute of limitations enacted under state law is a significant component of state sovereignty. It is entirely within a state's prerogative to determine generally the practice and procedure within its own courts but also in more specific terms to set any deadlines for the prosecution of state court claims in those state courts. In fact, it appears that the petitioner agrees that a statute of limitations on a state law claim effects principles of state sovereignty. The petitioner acknowledges that a compelled waiver of a state statute of limitations by a federal district court "invade[s] state sovereignty to some degree." Pet. Br. at 15. The United States also concedes that a statute of limitations is a "state policy choice." U.S. Br. at 27.

Article III confers the power on Congress to create the "inferior courts" and to regulate their jurisdiction. However, in no context are state courts considered "inferior courts" subject to regulation and control by congressional authority. State courts derive their authority from state law and state constitutions. They are distinctly separate from federal courts, although they can and do exercise concurrent jurisdiction. As Chief Justice Marshall observed, "[t]he state courts are

not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court . . . They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government." *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807). Because Congress' Article III power is limited to inferior federal courts, Congress clearly lacks authority to create state courts, regulate their jurisdiction, or establish rules of practice and procedure therein.

This conclusion has been recognized in several decisions of this Court. For instance, in *Mondou v. New York, New Haven, & Hartford Railroad Co.*, 223 U.S. 1 (1912), this Court explained that "there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure . . ." 223 U.S. at 56. More recently, in *Felder v. Casey*, 487 U.S. 131 (1988), this Court recognized that "[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. at 138.

Contrary to the claims of petitioner and the United States, Section 1367(d) does not govern procedure within the federal courts. It does not toll the statute of limitations for a federal claim. Instead, it attempts to toll the statute of limitations for a state claim being asserted in a state court. In practical terms, Section 1367(d) does not regulate federal court procedure and practice; rather it regulates state court procedure and practice. As a result, it is incorrect to view Article III as a valid source of authority for a law regulating state courts.

Moreover, Section 1367(d) constitutes an unconstitutional intrusion on state sovereignty regardless of whether the tolling

of a statute of limitations is deemed procedural or substantive law. Historically, this Court has held that Congress lacks the power to interfere with or disregard state statutes of limitations. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), this Court ruled that a state statute of limitations is substantive state law that a federal court hearing a state law claim under diversity jurisdiction is bound to apply under the *Erie* doctrine.[6] Later, in *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949), this Court held that state law governing the time of commencement of an action must be applied in adjudicating a state law claim. The *Ragan* Court explained that "[w]e cannot give the [claim] longer life in federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. at 533-34. The Court concluded that commencement rules are an "integral part" of the statute of limitations, and hence, state law must govern. *See also Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The tolling provisions that limit application of a statute of limitations are likewise an "integral part" of the statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 269 n.17 (1985) ("[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling . . .").

This case law reflects that a state statute of limitations and its tolling provisions must be applied in federal cases where state law claims are adjudicated. This case law further reflects that Congress lacks the power to interfere with or override state law with respect to a state statute of limitations. Nonetheless, Section 1367(d) was expressly enacted to interfere with and override the application of a state statute of limitations by a state court in a state law action. This

6. The *Erie* doctrine originated in *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938).

enactment is not only in contravention of the historical scope of congressional power in this area but is also clearly contrary to decades of Supreme Court precedent governing the practice and procedure in federal courts.

In *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that, as a matter of constitutional law, the law to be applied by the federal court in diversity cases is state substantive law. The *Erie* Court explained its rationale:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.
>
> * * *
>
> [T]he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.

304 U.S. at 78-79. Importantly, the *Erie* doctrine represents a balancing of Article III powers and the Tenth Amendment.

This Court recognized that state sovereignty mandates no interference by Congress or the federal judiciary with state substantive law or the workings of a state judiciary. Consequently, it is most evident that Section 1367(d) does precisely what *Erie* rejects — it is Congress' attempt to declare or limit the application of state substantive law. Actually, in enacting Section 1367(d), Congress takes this a step further and attempts to limit state substantive law with respect to state law claims actually litigated in state courts.

Section 1367(d) has breathed life into state law claims brought in state court which would otherwise be barred by operation of state law. Section 1367(d) has resurrected those state claims in contravention of state sovereignty. In short, Congress should not be permitted to facilitate clearing federal dockets of state law claims by usurping the state's sovereignty and dictating that state courts hear cases that are not otherwise cognizable in state court.

C. The case law on which the petitioner and the United States rely to support the constitutionality of Section 1367(d) is readily distinguishable and does not suggest that Congress has the power to abrogate state law sovereign immunity as applied in a state law claim litigated in a state court.

The petitioner and the United States have cited several cases of this Court for the proposition that Congress has the authority to legislate a tolling of a state statute of limitations. These cases are readily distinguishable from the present case on several bases. First and foremost, none of the cited cases addressed the precise issue raised in this litigation where the statute of limitations established not only the deadline for filing, but more importantly, the extent of the State's limited

waiver of sovereign immunity. For the most part, these cases address some form of equitable tolling that was recognized and applied to cases pending in federal court. The application of equitable tolling, however, has never been an issue in this case.

The case of *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which is cited in the petitioner's brief, is purely an equitable tolling case. An action was commenced under the Federal Employers' Liability Act (FELA) in state court. That action was dismissed because venue was improper, and eight days later, the plaintiff re-filed in federal court. While the action was pending in state court, the three-year statute of limitations under FELA had expired. This Court ruled that "the FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years." 380 U.S. at 427. Consequently, this Court applied the doctrine of equitable tolling to extend the statute of limitations. *Burnett* involved the application of a *federal* statute of limitations to a *federal* cause of action that was adjudicated in a *federal* court. This Court simply recognized that federal law permitted the equitable tolling of a federal statute of limitations.

The petitioner's reliance on the case of *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), is similarly misplaced. This Court explained that the action "was not a common-law action but one of statutory origin to enforce the award of a [federal] administrative tribunal." 321 U.S. at 348. The Court did not find the state law statute of limitations to be applicable. Instead, the Court concluded that "[a] special two-year limitation from the time of award was prescribed by the federal statute, and this action was brought within that period." *Id.* In dicta, the Court

reasoned that a state statute of limitations should not bar a claim where the limitations period elapsed during the pendency of a federal administrative claim. However, the Court applied what is in essence an equitable tolling approach to the question. Moreover, *Railroad Telegraphers* was a *federal* action adjudicated in *federal* court which further distinguishes it from the present case.

The petitioner also cites the case of *Hanger v. Abbott*, 73 U.S. 532 (1867), where this Court applied the doctrine of equitable tolling to a claim between citizens of New Hampshire and Arkansas which accrued during the Civil War. The Court reasoned that the right to sue was suspended during the Civil War, and as a result, the applicable statute of limitations was tolled during the war. In contrast to the present case, *Hanger* was adjudicated in a federal court and was pre-*Erie* meaning that the Court was not required necessarily to apply the applicable Arkansas law on tolling. It is unclear from the opinion whether the doctrine of equitable tolling that was applied had originated from the federal common law or from state law.

Interestingly, in *Hanger*, *supra*, the Court avoided basing its decision on an Act of Congress from 1864 entitled "An Act In Relation To The Limitation Of Actions In Certain Cases," 13 Stat. 123 (1864).[7] The constitutionality of that Act, however, was squarely presented to the Court in *Stewart v. Kahn*, 78 U.S. 493 (1870), a case not cited by the petitioner but raised by the United States in its brief. *See* U.S. Br. at

7. In *Hanger*, *supra*, the Court wrote: "Plaintiffs also rely upon the act of Congress of eleventh of June, 1864, as being sufficient to take the case out of the operation of the statute, but it is not necessary to decide that point in this case, and we express no opinion upon the subject." 73 U.S. at 542.

28-29. Congress recognized that civil and criminal defendants in the Southern states were potentially unable to be served with legal process by reason of the Civil War. Accordingly, Congress enacted legislation providing that "the time during which such [defendants] shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action." 78 U.S. at 504. In *Stewart*, the Court ruled that this tolling statute applied to cases pending in both federal and state courts. The Court concluded that Congress was authorized to enact this tolling statute not based upon its Article III powers but rather based on its Article I war powers. The Court explained further as follows:

> Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined.
>
> * * *
>
> . . . the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority.

78 U.S. at 506-507.

Thus, *Stewart* does not provide support for the petitioner's argument that Congress is authorized under Article III to toll a state law statute of limitations applied to a state law claim adjudicated in a state court. To the contrary, such a unique statute was found constitutional in *Stewart* on the basis of Congress' war powers alone. This Court did not find that Congress was otherwise authorized to intrude upon the practice and procedure in state courts on the basis of its Article III powers. It is also worth noting that the *Stewart* Court did not address specifically the effect on state sovereignty. More specifically, the Court did not address the scenario presented in the case at bar where the federal statute not only tolled a statute of limitation but also extended the State's limited waiver of sovereign immunity. That would not have been an issue in 1870, at which time the States and their political subdivisions enjoyed absolute sovereign immunity from suit. In sum, *Stewart* cannot be read as authority for the enactment of Section 1367(d), particularly where the critical questions of state sovereignty were not at issue.

D. The existence of other federal tolling statutes or the power to stay certain state court proceedings does not provide support for Congress' exercise of its Article III powers in enacting Section 1367(d).

The petitioner has suggested that the constitutionality of other federal statutes allowing for tolling of state statutes of limitations and stays of state court actions is called into doubt by the decision of the South Carolina Supreme Court. However, the petitioners are reading the lower court's decision much too broadly. The South Carolina Supreme Court has held only that Congress lacked the authority under Article III and the Necessary and Proper Clause to toll the

statute of limitations and extend the limited waiver of sovereign immunity enjoyed by governmental entities under South Carolina law. The lower court did not decide nor even suggest that Congress lacks authority to provide for the tolling of a statute of limitations in other contexts such as the Soldiers' and Sailors' Civil Relief Act of 1940 or the Y2K Act.

Quite frankly, in the appropriate case where the constitutionality of those Acts may be challenged, it will be incumbent on the courts to examine the source of the congressional power for each respective piece of legislation and its effects on state sovereignty. In certain instances, Congress may have acted within its authority and not in violation of state sovereignty. For example, in enacting the Soldiers' and Sailors' Civil Relief Act of 1940, Congress was acting within its Article I powers to provide for the nation's military and its governance. Similarly, in enacting the Y2K Act, Congress was acting pursuant to its Article I commerce power.

The petitioner also suggests that the constitutionality of the federal judiciary's authority to stay certain state court proceedings is called into doubt by the lower court's decision. Again, that decision did not address such issues. However, in the appropriate case, the reviewing court must examine the source of congressional authority for allowing a federal court or federal law to stay state court proceedings. For instance, the petitioner cites the automatic stay of all judicial proceedings under the Bankruptcy Code, 11 U.S.C. § 362(a). The automatic stay, however, has been held constitutional because Congress possesses Article I powers to legislate in the bankruptcy area. *See, e.g., Kalb v. Feuerstein*, 308 U.S. 433 (1940).

In short, the existence of other federal tolling statutes or the power to stay certain state court proceedings does not provide support for Congress' exercise of its Article III powers in enacting Section 1367(d). Conversely, a finding that Congress exceeded its authority under Article III does not suggest that Congress lacks authority under an enumerated Article I power to address what have historically been the consequences of extraordinary events such as war or commercial crisis. Most importantly, the existence of other federal tolling statutes or the power to stay certain state court proceedings is not determinative of the issue specifically decided by the lower court in this case — whether Section 1367(d) may enlarge the limited waiver of sovereign immunity enjoyed by States and their political subdivisions under state law and as applied to state claims litigated in state courts.

E. Contrary to the petitioner's assertions, the ruling below will not bar or discourage civil rights litigants from prosecuting their claims.

Throughout its brief, the petitioner attempts to shift the focus from the constitutionality of Section 1367(d) to its utility. The petitioner argues the many perceived benefits of Section 1367(d) to the orderly operation of the federal courts and to the preservation of state law claims asserted by civil rights plaintiffs. Yet, the issue is not whether Section 1367(d) serves a beneficial purpose. Instead, the issue is whether Congress had the authority to toll a state law statute of limitations and to extend the limited waiver of sovereign immunity for state law claims adjudicated in state court. Simply because a statute may have a beneficial purpose does not mean that Congress had the authority to enact the law or apply the law to a certain class of persons or entities.

In particular, the petitioner complains that without Section 1367(d) a civil rights litigant will be essentially barred from bringing both federal and state law claims in a federal forum. She reasons that a litigant will not want to risk filing the action in federal court where her state law claims may be dismissed without prejudice after the statute of limitations has already expired. There exist, however, a number of solutions for the petitioner's "access to justice" concerns. It is worth noting that Section 1367(d) was enacted in 1990, and prior to that time, civil rights litigants enjoyed a constitutionally adequate level of access to justice.

Whether Section 1367(d) applies to a case or not, a plaintiff has the ability to bring all of his or her claims in the same forum. A state court possesses concurrent jurisdiction to hear federal constitutional claims under 42 U.S.C. § 1983. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) ("federal and state courts have concurrent jurisdiction over actions brought under § 1983"). Likewise, a civil rights plaintiff is not barred from commencing her federal claims and state claims together in a federal court action. But, if there exists a statute of limitations concern, the plaintiff may commence separate actions in federal and state courts and may potentially seek to stay one of the actions if desired. The petitioner raises concerns about claim-splitting; however, there is no South Carolina law prohibiting claim-splitting. Indeed, in this very case, the petitioner did not wait until her federal action was fully adjudicated through appeal before pursuing a second action. While an appeal was pending in the Fourth Circuit Court of Appeals, she proceeded with filing and prosecuting her state court action. Her state court action was not barred on the basis of claim-splitting.

Furthermore, similar concerns as raised by the petitioner have previously been rejected by this Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The plaintiffs in that case urged this Court not to apply the Eleventh Amendment to supplemental state claims brought against state officials. They argued that "'considerations of judicial economy, convenience and fairness to litigants' counsel against a result that may cause litigants to split causes of action between state and federal courts." 465 U.S. at 121. In response, this Court recognized that "[i]t may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or bifurcation of claims. *That is not uncommon in this area*." 465 U.S. at 122. (Emphasis added). This Court further concluded: "That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'" 465 U.S. at 123, *citing Employees v. Missouri Public Health & Welfare Dept.*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in result).

F. The decision of the court below does result in a violation of due process and does not discriminate against litigants asserting federal constitutional rights.

In addition to making policy arguments in favor of tolling state court claims while pending in federal court, the petitioner argues that the decision by the South Carolina Supreme Court constitutes a violation of due process or at least unconstitutionally impedes a litigant's right of access to a federal forum. In this same vein, the petitioner suggests that the lower court's decision somehow discriminates against litigants asserting federal constitutional rights. These arguments lack merit.

In *Raygor*, *supra*, this Court has already ruled that Section 1367(d) does not apply against a State to toll a statute of limitations or enlarge the waiver of state law sovereign immunity. Consequently, when seeking to bring a federal civil rights claim against a State or state official coupled with a state law claim arising from a common nucleus of operative facts, a litigant currently faces the same exact "access to justice" issues raised by the petitioner here. If the plaintiff brings all of the claims in federal court, the state claims may be dismissed after the statute of limitations expires, thereby resulting in a loss of the opportunity to litigate the state claims in state court. To avoid that possibility, the plaintiff may commence both claims in state court alone or may split his claims and file in both courts. As claimed by the petitioner, this is the "dilemma" that violates due process and discriminates against litigants asserting federal constitutional rights. Yet, this Court has already implicitly rejected those same arguments in *Raygor*. If the absence of a thirty-day tolling window is not unconstitutional in litigation against a State, there is no reasonable argument that can be made that the absence of the same thirty-day tolling window is unconstitutional relative to claims against a political subdivision. In effect, the due process and discrimination arguments did not require a different result in *Raygor*, and the same arguments do not require a different result here.

Litigants are constantly compelled to make choices and strategy decisions. One of the first such decisions is typically choice of forum. A civil rights plaintiff must decide whether to commence her claim in federal court, state court, or both. A civil rights defendant must decide whether to remove a federal claim brought in state court. There are obviously consequences that accompany those decisions. For instance, a State defendant may be forced to waive Eleventh

Amendment immunity in order to obtain a federal forum for declaratory or injunctive relief claims. *See Lapides v. Bd. of Regents of the University System of Georgia*, 535 U.S. 613 (2002). Likewise, a plaintiff may be required to place her state claims at risk of dismissal in order to pursue a federal forum. The fact that a litigant is confronted with these choices and resulting consequences does not violate due process and clearly is not discriminatory. As the *Pennhurst* Court recognized, a limitation on choice of forum is a natural and expected result of "our system of federalism." *Pennhurst*, 465 U.S. at 123. That limitation does not rise to the level of a constitutional deprivation.

II. THE LACK OF A CLEAR STATEMENT BY CONGRESS OF ITS INTENT FOR SECTION 1367(d) TO APPLY TO STATES AND THEIR POLITICAL SUBDIVISIONS ALLOWS THIS COURT TO AVOID THE CONSTITUTIONAL QUESTION RULED UPON BY THE COURT BELOW.

The respondent urges the affirmance of the decision of the South Carolina Supreme Court on the basis that Section 1367(d) violates the Tenth Amendment as applicable to a political subdivision of the State of South Carolina. Nonetheless, the respondent further recognizes that this Court need not reach the constitutional question issue just as the Court did not reach that similar question in *Raygor*, *supra*. This Court may affirm in result only and find as a matter of statutory construction that Section 1367(d) is not applicable to political subdivisions just as the *Raygor* Court ruled that it is not applicable to the States themselves.

The South Carolina Supreme Court did not apply the clear statement rule of statutory construction, but in light of this Court's decision in *Raygor*, that court could have construed Section 1367(d) so as to avoid a difficult constitutional question. *See Raygor*, 534 U.S. at 549 (Ginsburg, J., concurring) ("statutes should be construed so as to avoid difficult constitutional questions"). As discussed in *Raygor*, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." 534 U.S. at 543. "[T]he clear statement principle reflects 'an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" 534 U.S. at 544, *citing Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Clearly, the application of Section 1367(d) affects the constitutional balance between States and the federal government. In *Raygor*, this Court explained:

> [A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity.

534 U.S. at 544. In applying the clear statement rule, this Court concluded that "§ 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States." 534 U.S. at 545. Likewise, it may be said that Section 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations

for claims asserted against any political subdivision such as the respondent. More specifically, there is no specific or unequivocal intent expressed in the statute to suggest that Congress intended to abrogate the sovereign immunity enjoyed by a political subdivision under state law and as applied to state law claims litigated in state court. Hence, Congress has not made its intention "unmistakably clear" to apply the tolling provision to political subdivisions where the result is the abrogation of state law sovereign immunity — a clear intrusion into the historic powers of a State.

In short, this Court need not reach the constitutional question ruled upon by the South Carolina Supreme Court. As in *Raygor*, the application of the clear statement rule leads to the conclusion that just as Section 1367(d) is not applicable to nonconsenting States, it is likewise not applicable to nonconsenting political subdivisions of the States.

CONCLUSION

For the foregoing reasons, the respondent submits that the decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

ANDREW F. LINDEMANN
Counsel of Record
WILLIAM H. DAVIDSON, II
DAVID L. MORRISON
DAVIDSON, MORRISON AND
LINDEMANN, P.A.
1712 St. Julian Place, First Floor
Post Office Box 8568
Columbia, SC 29202
(803) 806-8222

Attorneys for Respondent

Supreme Court U.S.
FILED
FEB 21 2003
OFFICE OF THE CLERK

No. 02-258

In the Supreme Court of the United States

SUSAN JINKS, PETITIONER

v.

RICHLAND COUNTY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

		Page
I.	Unlike the States, counties and municipalities have no constitutional immunity	1
II.	Congress may toll or pre-empt state limitations periods that are inconsistent with valid federal enactments and policies	7

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999) 1, 2, 3, 4, 5, 16
Burnett v. *New York Cent. R.R.*, 380 U.S. 424 (1965) 19
Carnegie-Mellon Univ. v. *Cohill*, 484 U.S. 343 (1988) 9, 10
City of Columbus v. *Ours Garage & Wrecker Serv. Inc.*, 122 S. Ct. 2226 (2002) 4
Curtis, Ex parte, 106 U.S. 371 (1882) 8
DeLoach v. *Griggs*, 72 S.E.2d 647 (S.C. 1952) 19
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 12
Felder v. *Casey*, 487 U.S. 131 (1988) 11-12, 19
Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) 12
Hanna v. *Plumer*, 380 U.S. 460 (1965) 13
Hess v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) 4
Howlett v. *Rose*, 496 U.S. 356 (1990) 12
Lawton v. *New York Life Ins. Co.*, 186 S.E. 909 (S.C. 1936) 18
The Legal Tender Cases, 110 U.S. 421 (1884) 8, 10, 11
Lincoln County v. *Luning*, 133 U.S. 529 (1890) 2
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 6, 20
McElmoyle v. *Cohen*, 38 U.S. (13 Pet.) 312 (1839) 6, 11
Metropolitan R.R. v. *District of Columbia*, 132 U.S. 1 (1889) 2
Mondou v. *New York, New Haven, & Hartford R.R.*, 223 U.S. 1 (1912) 11

Cases—Continued: Page

Monell v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) 5
Moor v. *County of Alameda*, 411 U.S. 693 (1973) 4
Mt. Healthy City Bd. of Educ. v. *Doyle*, 429 U.S. 274 (1977) 4
New York v. *United States*, 505 U.S. 144 (1992) 14, 15
Nunnery v. *Brantley Constr. Co.*, 345 S.E.2d 740 (S.C. Ct. App. 1986) 18
Owen v. *City of Independence*, 445 U.S. 622 (1980) 2
Pierce County v. *Guillen*, 123 S. Ct. 720 (2003) 7, 12, 17
Printz v. *United States*, 521 U.S. 898 (1997) 14, 15
Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) 12
Raygor v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) 3, 6
Regents of the Univ. of Cal. v. *Doe*, 519 U.S. 425 (1997) 4, 7
Scott v. *McCain*, 250 S.E.2d 118 (S.C. 1978) 18
State Highway Comm'n v. *Utah Constr. Co.*, 278 U.S. 194 (1929) 2
Stewart v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870) 7-8, 17
Sun Oil Co. v. *Wortman*, 486 U.S. 717 (1988) 13, 16
Testa v. *Katt*, 330 U.S. 386 (1947) 16
United Mine Workers v. *Gibbs*, 383 U.S. 715 (1966) 9, 10
United States v. *Classic*, 313 U.S. 299 (1941) 8-9
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 5

Constitution and statutes:

U.S. Const.:
Art. I:
§ 8, Cl. 9 9
§ 8, Cl. 11 8
§ 8, Cl. 18 (Necessary and Proper Clause) 8, 12

Constitution and statutes—Continued: Page

Art. III, § 1 9
Art. IV:
§ 1 (Full Faith and Credit Clause) 13
§ 2 (Supremacy Clause) 15
Amend. X 13, 14
Amend. XI 5, 13, 14
Amend. XIV, § 5 2
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 525 17
11 U.S.C. 108(c) 9, 10, 17
28 U.S.C. 1331 9
28 U.S.C. 1367(a) 6, 9, 10, 11
28 U.S.C. 1367(b) 6
28 U.S.C. 1367(c) 6, 9, 10, 11
28 U.S.C. 1367(d) ..... *passim*
28 U.S.C. 1446 9
28 U.S.C. 1738 18
42 U.S.C. 1983 ..... 6, 9

Miscellaneous:

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969) 10, 17

In the Supreme Court of the United States

No. 02-258

SUSAN JINKS, PETITIONER

v.

RICHLAND COUNTY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE UNITED STATES

Respondent cannot seriously dispute the South Carolina Supreme Court's conclusion (Pet. App. 7a) that 28 U.S.C. 1367(d) is "necessary" legislation within the meaning of the Necessary and Proper Clause of the Constitution. Instead, respondent and its amici argue that Section 1367(d) is not "proper" legislation, because sovereign immunity precludes Congress from tolling the limitations period for state-law claims against municipal and county defendants while such claims are pending in federal court, and because Congress lacks constitutional authority to pre-empt state limitations periods for state causes of action generally. Neither theory has merit.

I. Unlike the States, Counties And Municipalities Have No Constitutional Immunity

Respondent's claim that sovereign immunity precludes Section 1367(d) from being applied to county and municipal defendants rests on a fundamental misapprehension about our federal system. This Court has repeatedly held that *States* occupy a special role as "residuary sovereigns" and "joint participants in" the dual system of government established by the Constitution. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999). Because of that special status, Congress may not subject non-consenting States to private lawsuits—it cannot abrogate their sovereign immunity—in federal court or in

the State's own courts except as authorized by Section 5 of the Fourteenth Amendment. *Id.* at 728-729, 756. That limit, moreover, applies to suits against an "arm or *alter ego* of the State." *State Highway Comm'n* v. *Utah Constr. Co.*, 278 U.S. 194, 199 (1929).

Respondent, however, is not—and does not claim to be—a "State" or an "arm of a State." Respondent is a county. Unlike States, municipalities and counties are not coordinate "sovereigns" in our federal system. See U.S. Br. 32-34. To the contrary, an "important limit to" the constitutional "principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756. This Court rejected the claim that counties enjoy constitutional sovereign immunity over a century ago in *Lincoln County* v. *Luning*, 133 U.S. 529, 530 (1890). Noting that the Court's records "for the last thirty years are full of suits against counties," the Court declared that counties, while "territorially a part of the State," are "corporation[s]" that may form "part of the State *only in that remote sense* in which any city, town, or other municipal corporation may be said to be a part of the state." *Ibid.* (emphasis added). The "powers of a municipal character which have been or may be lodged in the city corporations * * * do not make those bodies sovereign." *Metropolitan R.R.* v. *District of Columbia*, 132 U.S. 1, 9 (1889). See *Alden*, 527 U.S. at 715 (contrasting States with "mere * * * political corporations").[1]

[1] Respondent's unsupported assertion (Br. 15) that "[p]rinciples of sovereign immunity" have long "protected not just the arms of the State" but also "all forms of government including lesser governmental entities" is thus unpersuasive, especially as a matter of federal law. Municipalities were "routinely sued in both federal and state courts" by 1871, and it was by then "a general rule" that "a municipality's tort liability in damages was identical to that of private corporations and individuals." *Owen* v. *City of Independence*, 445 U.S. 622, 639-640 (1980). Respondent offers no persuasive reason for overturning more than a century of this Court's precedents. It may be true that, in some instances, state common law or statutes accorded municipalities and other lesser entities a defense to liability under the rubric of "immunity," but that is not relevant to the scope of *Congress's* constitutional powers. See pp. 6-7, *infra*. Respondent thus misunderstands (and inadvertently misquotes) the United States' position in claiming that the "United States acknowledges that '[w]hether and to what extent respondent and other local governmental bodies enjoy 'sovereign immunity' *is* a matter of *state* law is for South Carolina officials to decide." Resp. Br. 15 n.4 (some emphasis added). The United States' position is that "[w]hether and to what extent respondent and other local governmental bodies enjoy 'sovereign immunity' *as* a matter of *state* law is for South Carolina officials to decide." U.S. Br. 32 (some emphasis added). "[C]ounties and municipalities," however, "have no immunity as a matter of *federal* law from such private suits as Congress chooses to authorize," *ibid.*, and they lack any "distinct *federal* status that would render" Section 1367(d) "invalid as applied to them," *id.* at 34 (emphasis in original).

For that reason, the South Carolina Supreme Court erred in assuming without discussion that suits against respondent are, for federal constitutional purposes, equivalent to suits against the State itself. See Pet. App. 8a ("As a matter of sovereignty, the *State* has the authority to determine whether" and "the conditions under which *it* consents to suit") (emphases added and omitted). Even if South Carolina affords both the State itself and "lesser entities" such as counties and municipalities a special immunity from suit as a matter of state law, federal constitutional immunity extends only to the State and arms of the State. Accordingly, respondent does not advance its argument by invoking the decisions of this Court recognizing the special status of States in our system of government. Those decisions—even as quoted by respondent—address Congress's power to authorize suit against the States and arms of the States. See, *e.g.*, *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 534 (2002) (quoted Resp. Br. 9, 12) ("suits against *a state sovereign*" and "claims against *state defendants*") (emphases added); *Alden*, 527 U.S. at 749 (quoted Resp. Br. 9) ("the immunity *of a sovereign*") (emphasis added).[2]

[2] Indeed, while the majority opinion in *Alden* refers to States and state sovereigns over 300 times, it mentions political subdivisions such as

Nor does it matter that respondent characterizes itself as a "political subdivision" of the State. See *Hess* v. *Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 43 (1994) ("the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power") (quotation marks and citation omitted). Respondent can claim the benefit of the State's constitutional status only if respondent can show that it is *the State* or is an *"arm" of the State*—an argument that respondent does not attempt to make. See *Moor* v. *County of Alameda*, 411 U.S. 693, 717, 721 (1973) (California county, which could exercise corporate powers, hold property in its own name, sue, be liable for judgments, and levy taxes, is not an "arm of the State"); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (contrasting "county or city" with "an arm of the State"); *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 430 (199., (whether the judgment "would be enforceable against the State" itself "is of considerable importance" in determining whether entity is an "arm of the State"); *Hess*, 513 U.S. at 48-49, 50 (no immunity where liability does not implicate "the States' solvency and dignity").[3]

---

counties and municipalities twice—both times to *distinguish* them from the State itself, emphasizing that they cannot claim the State's sovereign immunity. See 527 U.S. at 756 (sovereign immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *id.* at 715 (States "are not relegated to the role of mere provinces or political corporations.").

[3] For similar reasons, the observation of the State amici (Br. 20) that cities and counties "derive their existence" from and "can exercise only those powers conferred upon" them by the States is irrelevant. The same is true of *private* corporations created by state law. Amici's reliance on this Court's observation that States may delegate political power to "political subdivisions" such as counties and municipalities—an observation made in an entirely different context—is likewise misplaced. See State Amici Br. 20-21 (quoting *City of Columbus* v. *Ours Garage & Wrecker Serv. Inc.*, 122 S. Ct. 2226, 2232 (2002)). The States also delegate political power to individuals, who enjoy no constitutional immunity where the suit is not, in substance, a damages action against the State. Under this

Respondent nonetheless asserts that "the scope and extent of federal constitutional immunity is not obviously limited to Eleventh Amendment immunity." Resp. Br. 14; see *id.* at 15 ("absence of Eleventh Amendment immunity * * * not dispositive"). But while the federal constitutional immunity from suit this Court has recognized is not limited to the precise terms of the Eleventh Amendment, it is limited to States and arms of the State. *Alden*, 527 U.S. at 713. The federal immunity "derives * * * from the structure of the original Constitution itself," *id.* at 728, and is "demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design," *id.* at 729. That constitutional design designates the States and the federal government as sovereigns and accords them a sovereign's immunity to suit, but it does not do the same for municipal corporations and counties. See *id.* at 756 (immunity "does not extend to * * * a municipal corporation or other governmental entity which is not an arm of the State"). The "Founders established 'two orders of government,'" *id.* at 751—not three or more, as respondent and its amici propose.

For similar reasons, respondent errs in arguing (Br. 32; see State Amici Br. 26-30) that Section 1367(d) should be read as inapplicable to lawsuits against county and municipal defendants. Precisely because local governments do not enjoy the same sovereign status as the States, this Court has not required a clear statement from Congress before local governments may be subjected to suit. Compare *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989) (State not a "person" for purposes of 42 U.S.C. 1983), with *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 683-689 (1978) (city is a "person" for purposes of Section 1983). Respondent's and its amici's reliance on *Raygor*,

---

Court's cases, a state-created entity may claim the State's sovereign immunity as its own only if that entity is "an arm of the State," a test respondent and its amici make no effort to meet.

supra, (*e.g.*, State Amici Br. 28) is therefore misplaced. *Raygor* requires a clear statement before the Court will conclude that Congress has attempted to adjust the extent to which a "state sovereign" is "amenable to suit in its own courts." 534 U.S. at 544. It does not require a clear statement before Congress addresses the extent of municipal liability.[4] Further, in *Raygor*, the Court found reason to doubt whether Section 1367(a), (b), and (c), should be read to encompass a lawsuit against a State in federal court; the Court therefore found corresponding reason to doubt whether Section 1367(d) was meant to apply to suits against state sovereigns. See 534 U.S. at 545-547. Here, no one disputes that Section 1367(a), (b), and (c) apply in lawsuits against counties and municipalities. There is no basis for giving Section 1367(d) a radically different scope.

Unable to identify a constitutional or federal statutory basis for according counties immunity from otherwise valid federal legislation, respondent and its amici declare that Congress can neither "abrogate sovereign immunity *as derived under state law*," Resp. Br. 16 (emphasis added), nor intrude on the "State's authority to set the conditions on which to waive * * * the [state-law] immunity of its political subdivisions under State law," State Amici Br. 19. The States, of course, have inherent sovereign authority to enact laws that identify when municipalities will be subject to suit, the causes of action that can be maintained, and any defenses, including limitations periods. But States have that sovereign law-making authority with respect to wholly private defendants too. "[A]ll legislative powers appertain to sovereignty." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819); *McElmoyle* v. *Cohen*, 38 U.S. (13 Pet.) 312, 326 (1839) (States may set "the time after which suits or

[4] The clear statement rule the Court applied in *Raygor* also had the virtue of avoiding a potential constitutional issue, namely Congress's authority to interfere with the scope of a State's waiver of its federal constitutional immunity. Here, there is simply no weighty federal constitutional issue to be avoided.

actions shall be barred * * * in virtue of that sovereignty by which it exercises its legislation *for all persons and property*.") (emphasis added). If the State exercises that authority by establishing laws that conflict with a valid federal policy or enactment, however, they—like any other state laws—may be pre-empted. See, *e.g.*, *Pierce County* v. *Guillen*, 123 S. Ct. 720, 731-732 (2003) (upholding, under the Commerce Clause, a federal evidentiary privilege that supersedes state evidence and discovery rules in cases arising under state law). Indeed, if South Carolina purported to lift the state-law immunity to suit in all cases against cities and counties except those brought by federal employees, or by individuals who had asserted rights under a federal statute, Congress would have unquestioned power to pre-empt those limits as inconsistent with federal policy. The fact that a State chooses to attach the label "sovereign immunity" to such a state-law limit on municipal or county liability does not entitle that limit to special status under federal law. To the contrary, whether a particular defendant is the State or an arm of the State entitled to constitutional immunity is a question of federal, not state, law. See U.S. Br. 32 n.8; *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 530 n.5 (1997). Unlike the federal constitutional immunity of States and arms of the States, state-law limits on suits may be pre-empted (not abrogated) by a federal statute, like Section 1367(d), through normal operation of the Supremacy Clause.

II. Congress May Toll Or Pre-empt State Limitations Periods That Are Inconsistent With Valid Federal Enactments And Policies

A. Respondent and its amici also assert that Section 1367(d) is unconstitutional in all its applications because Congress lacks authority to toll limitations periods for state causes of action, regardless of the defendant's identity. See Resp. Br. 17-22; State Amici Br. 8-19. The South Carolina Supreme Court, however, did not adopt that argument, and this Court foreclosed it more than a century ago in *Stewart*

v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870). In *Stewart*, the Court upheld a federal statute that tolled state limitations periods in civil and criminal cases during the Civil War. Here, respondent argues that, because state courts "are distinctly separate from federal courts," Congress "clearly lacks authority to * * * establish rules of practice and procedure therein." Resp. Br. 18-19. But the defendant in *Stewart* raised precisely the same argument: Because "the State courts are considered as courts of another sovereignty," he argued, Congress "cannot prescribe rules of proceeding for such State courts." 78 U.S. (11 Wall.) at 498 (footnote omitted) (argument of counsel). *Stewart* rejected that contention, upholding the tolling provision as "necessary and proper" to the effectuation of Congress's express powers under the Constitution. *Id.* at 506. As explained in our opening brief (at 21-25), and below (pp. 9-11, *infra*), Section 1367(d) is likewise "necessary and proper" to the effectuation of Congress's express constitutional powers here.

Attempting to distinguish *Stewart*, respondent and its amici note that the statute there was "necessary and proper" to Congress's exercise of its Article I "war powers." Resp. Br. 26; State Amici Br. 10; Council of State Gov'ts Br. 20-21. But respondent and its amici fail to offer a persuasive reason why Congress's reliance on the war power of Article I, Section 8, Clause 11, rather than its other powers, meaningfully distinguishes *Stewart*. The text of the Necessary and Proper Clause accords Congress power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," *i.e.*, *all* of the previously listed Article I, Section 8 powers, "*and all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18 (emphasis added). Consistent with constitutional text, Congress's power to enact "necessary and proper" legislation is not remotely limited to its war powers, see, *e.g.*, *Ex parte Curtis*, 106 U.S. 371, 372 (1882); *The Legal Tender Cases*, 110 U.S. 421, 449-450 (1884); *United States* v. *Classic*, 313 U.S. 299, 320 (1941), and respondent offers no persuasive reason for denying Congress the authority it exercised in *Stewart*.[5]

Here, Section 1367(d) is "necessary and proper" to Congress's establishment of the lower federal courts and ensuring their efficacy under Article I, Section 8, Clause 9, and Article III, Section 1. See U.S. Br. 22-23. It is one of a number of provisions that permit the Article III courts to function by providing clear and friction-minimizing rules for the interaction of state and federal courts. See, *e.g.*, 28 U.S.C. 1446 (providing for removal of cases to federal court, stay of state proceedings, and remand of removed cases); *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988); 11 U.S.C. 108(c) (tolling state limitations periods for term of bankruptcy automatic stay, plus 30 days). Further, where the state-law claims are initially filed in federal court in connection with a federal cause of action—in this case, an action to enforce civil rights under 42 U.S.C. 1983—the tolling provision is necessary and proper to the execution of the constitutional grant of authority on which the federal cause of action is based. See U.S. Br. 26 n.7. Unless limitations periods are tolled while state-law claims are pending in federal court, plaintiffs with state and federal claims may be chilled from exercising their statutory right—a right granted here by 42 U.S.C. 1983, 28 U.S.C. 1331, and 28 U.S.C. 1367(a)—to assert those claims in federal court. U.S. Br. 22-23. That is true because, absent the protection provided by Section 1367(d), the selection of a federal forum would risk dismissal of the pendent state claims under the standards articulated in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), and 28 U.S.C. 1367(c), after the state limitations period, and thus the ability to assert those claims in state court, had expired.

---

[5] Respondent's other distinction is that, unlike the defendant in *Stewart*, it is a county or municipality. That argument fails because municipalities and counties have no special federal constitutional status. See pp. 1-7, *supra*.

Because of similar risks, this Court has recognized that, absent the equivalent of tolling through the "remand" of removed cases to state court, plaintiffs might be chilled from bringing federal claims that would render their cases removable. See *Cohill*, 484 U.S. at 352 n.9. For the same reasons, the absence of a tolling provision for state-law claims asserted as part of a single case or controversy in federal court might chill plaintiffs from exercising their statutory right to a federal forum. See U.S. Br. 22, 24. As the American Law Institute Study observed:

> It is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous.

Study of the Division of Jurisdiction Between State and Federal Courts 453-454 (1969) (ALI Study). Congress has authority to address not only the conduct of cases or controversies in federal court, but also the consequences of the pendency of such actions. Cf. 11 U.S.C. 108(c) (extending state limitations periods while bankruptcy automatic stay is in effect plus 30 days).

Section 1367(d) is also necessary and proper to Congress's creation of the lower federal courts and its regulation of their jurisdiction and modes of procedure. See U.S. Br. 20-25. Respondent nowhere disputes that Congress has constitutional authority to enact 28 U.S.C. 1367(a), which affords the federal courts supplemental jurisdiction over pendent state-law claims, and to apply that provision to all non-state defendants. That provision promotes "judicial economy" by permitting federal courts to resolve all of the federal- and state-law claims that make up a single "case or controversy" within the federal judicial power. See U.S. Br. 18-19; *Gibbs*, 383 U.S. at 725. Nor does respondent deny that Congress acted constitutionally in enacting 28 U.S.C. 1367(c), which

permits a federal district court to decline jurisdiction over state claims if, among other things, it has dismissed the federal claims. Section 1367(c) strikes a balance between the efficient resolution of related state and federal claims, and the need to avoid unnecessary federal resolution of state-law issues. U.S. Br. 20-21. The "justification" for that balance "lies in considerations of judicial economy," "convenience," and "comity," as well as the "promot[ion] [of] justice between the parties" that can be secured by "procuring" the state court's "surer-footed reading of applicable law" where appropriate. *Gibbs*, 383 U.S. at 726.

Section 1367(d) is an integral part of the balance established by Section 1367(a) and (c). Section 1367(d) both removes any artificial disincentive to exercising the congressionally created right to a federal forum in the first instance, see pp. 9-10, *supra*; U.S. Br. 22-23, and eliminates the distorting effect that untolled limitations periods may have on the exercise of judicial authority to retain or dismiss pendent state-law causes of action following dismissal of federal claims. Indeed, before Section 1367(d)'s enactment, district courts' exercise of discretion to retain or dismiss such claims was often skewed by limitations issues. See U.S. Br. 5-6 & nn. 1-2; Pet. Br. 13-16. For precisely those reasons, the South Carolina Supreme Court concluded that "Section 1367(d) is a useful aid to the exercise of federal jurisdiction, and, therefore, is 'necessary' within the meaning of the Necessary and Proper Clause." Pet. App. 7a (internal quotation marks omitted). Section 1367(d), that court explained, "allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis" proves insufficient, and "eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court." *Ibid.*

B. Because Section 1367(d) is necessary and proper legislation, respondent errs in relying on cases like *McElmoyle*, 38 U.S. (13 Pet.) at 327; *Mondou* v. *New York, New Haven, & Hartford R.R.*, 223 U.S. 1 (1912), and *Felder* v. *Casey*, 487

U.S. 131 (1988). Resp. Br. 18-19; see also Council of State Gov'ts Br. 11-13. Those cases recognize that the States have sovereign authority in the first instance to establish statutes of limitations and rules of procedure applicable to state-law cases in state courts. They do not resolve Congress's authority to supersede such laws to protect and effectuate federal interests. To the contrary, except for *Felder*, none of those cases involved federal statutes that might be thought to pre-empt state law. And in *Felder*, this Court held that, because the State's procedural requirements were inconsistent with the federal cause of action, they were pre-empted. 487 U.S. at 141-146. Thus, far from supporting petitioner's arguments, *Felder* undermines them. See also *Howlett* v. *Rose*, 496 U.S. 356, 377-378 (1990) (state-law immunity from suit pre-empted to the extent it extended "not only to the State and its arms but to municipalities, counties, and school districts that might otherwise be subject to suit" under the federal statute). Nor is respondent correct that a federal cause of action is a prerequisite to federal pre-emption of state rules that are inconsistent with federal law. See, *e.g.*, *Pierce County*, *supra*.

Respondent (Br. 20-21) and its amici (State Amici Br. 13; Council of State Gov'ts Br. 12-13) likewise err in asserting that diversity cases such as *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), provide support for respondent's argument that Section 1367(d) is unconstitutional. Those cases address the law that *federal courts* must apply to state claims *in the absence* of an otherwise valid federal statute governing the issue. They do not purport to address the power of Congress to supersede state laws in pursuit of legitimate federal policies.[6] "The *Erie* rule" thus "has never

[6] Respondent's and its amici's *Erie*-based arguments, moreover, appear to rest on a syllogism with a doubly false premise. They argue that Congress is without authority to order *federal courts* to apply federal rather than state law to resolve specific issues in claims arising under state law; it follows naturally, they appear to assume, that Congress cannot require state courts to do likewise. The premise of their argument, however, is false both generally and in this specific context. It is generally false because Congress has authority to pre-empt state laws—including limitations periods—that are inconsistent with otherwise valid federal interests. It is false here because Congress can pursue legitimate federal policies by directing federal courts to apply a federal limitations period, rather than a state limitations period, to claims arising under state law. Cf. *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 722, 726 (1988) (holding that forum State may apply its own limitations period "to claims that in their substance are and must be governed by the law of a different State" consistent with the Full Faith and Credit Clause). The State amici's reliance (Br. 9) on *Sun Oil* is misplaced. Although *Sun Oil* allows a forum State to apply its own statute of limitations to causes of action created by other States, it does not address whether a forum State may choose to apply its own limitations period where the laws of the United States—the Supreme law of the land—pre-empt that limitations period; nor does it address the scope of Congress's pre-emptive authority. For the same reason, it makes no difference that some States do not have a "savings" or "renewal statute" that tolls "the State's statutes of limitations" for "claim[s] brought in another sovereign's courts." Council of State Gov'ts Br. 5. In those areas in which Congress may constitutionally legislate, the United States is not merely "another sovereign"; it is the *supreme* sovereign, with authority to displace contrary state laws.

been invoked to void a Federal Rule," let alone a federal statute like Section 1367(d). *Hanna* v. *Plumer*, 380 U.S. 460, 470 (1965). See *Erie*, 304 U.S. at 79 (interference with "the legislative or the judicial action of the States is in no case permissible *except* as to matters by the Constitution specifically authorized or delegated to the United States.") (emphasis added). The scope of Congress's power is controlled by cases such as *Stewart*, *supra*, and *Pierce County*, *supra*, which uphold Congress's displacement of state limitations periods and evidentiary rules where necessary and proper to the exercise of valid federal powers.

C. Respondent also argues that the Tenth Amendment supplies counties and municipalities with the immunity from suit that the Eleventh Amendment, the "fundamental postulates" of our dual system of government, and cases like *Alden*, all withhold. The Tenth Amendment, however, does not

augment the immunity from suit conferred by the Eleventh Amendment and *Alden*, and so does not add anything to respondent's argument. As this Court has explained, the Tenth Amendment is in most of its applictions "essentially a tautology":

> If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York v. *United States*, 505 U.S. 144, 156 (1992). Here, Congress acted within the scope of its delegated powers in superseding state limitations periods that are inconsistent with legitimate federal policies. See pp. 9-11, *supra*. Section 1367(d) intrudes on state sovereignty no more than any other pre-emptive Act of Congress.

Nor is the Tenth Amendment anti-commandeering principle of *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, *supra*, applicable here. That principle bars Congress from "command[ing] state and local law enforcement officers" to "participate * * * in the administration of a federally enacted regulatory scheme"—*i.e.*, from "press[ing]" them "into federal service" in their official capacities. 521 U.S. at 902, 904, 905; see Resp. Br. 16; State Amici Br. 23. But Section 1367(d) does not command county or municipal officials to do anything, much less "command" them to administer a federal scheme. Instead, Section 1367(d) addresses the availability of a statute of limitations defense where the case or controversy was originally filed in federal court.

To the extent respondent or its amici suggest that Section 1367(d) violates the anti-commandeering rule because it compels *state courts* to adjudicate claims they would otherwise dismiss, see State Amici Br. 17-18 & n.7, they are mistaken. State courts exercising the judicial power must apply governing federal law to the cases before them. Far from violating the anti-commandeering principle implicit in the Tenth Amendment, the application of federal law in state courts is expressly mandated by the Supremacy Clause. "[T]he Laws of the United States shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*" U.S. Const. Art. VI, Cl. 2 (emphasis added). As this Court recognized in *New York* v. *United States*, federal "statutes enforceable in state courts do, in a sense, direct state judges to enforce them, *but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.* No comparable constitutional provision authorizes Congress to command state legislatures to legislate." 505 U.S. at 178-179 (emphasis added). Indeed, Congress's early enactments strongly suggest "that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907.

Section 1367(d) is consistent with that text and history. It does not require state courts to undertake resolution of a controversy that is beyond the judicial power. It merely provides that, in adjudicating limitations defenses for controversies originally filed but dismissed from federal court, state courts apply a federal tolling rule. No one disputes that Congress has the power to pre-empt state-law claims entirely, or to provide a federal defense to such claims. State Amici Br. 17. There is no logical reason why Congress cannot likewise pre-empt a state-law defense that is inconsistent with federal policy. That is especially true where, as here, the state law has the effect of disadvantaging plaintiffs for selecting a federal rather than a state forum. See pp. 17-19, *infra*. The State amici thus correctly concede (Br. 16) that, if Congress validly enacted Section 1367(d) "pursuant to one of its enumerated powers * * *, the Supremacy Clause would make that provision binding upon the States, even if it displaced the States' policy choices."

In any event, whatever the outer boundaries of Congress's power to require state courts to adjudicate claims in a manner that does not offend federal policy, they are not implicated here. This Court has repeatedly upheld Congress's power to require state courts to adjudicate claims over which they would prefer to decline jurisdiction. See U.S. Br. 28; *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 389-394 (1947). As the Court observed in *Alden*, the text of Article III gives "strong support to the inference that state courts *may be opened* to suits falling within the federal judicial power." 527 U.S. at 753.[7] This, moreover, is not a case in which Congress has required state courts to adjudicate claims on a subject matter they ordinarily would not address. The State of South Carolina has chosen, by its own enactments, to vest its courts with jurisdiction to hear tort claims like those at issue here against county defendants. Section 1367(d) merely requires that, in adjudicating those claims, state courts not apply a particular statute of limitations rule—a refusal to toll

[7] The defect in *Alden* was that the lawsuit—because it was against the State itself—was barred by sovereign immunity and outside the judicial power: "We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts." 527 U.S. at 754. Here, the controversy was within the judicial power and within the authority of federal courts to hear. The State amici also err (Br. 18 n.7) in relying on a partial quotation from *Alden*, because the quoted material (in context and in full) contradicts their position. *Alden* first recognized that Congress "may require state courts of 'adequate and appropriate' jurisdiction, * * * 'to enforce federal prescriptions, insofar as those prescriptions relat[e] to matters appropriate for the judicial power.'" 527 U.S. at 752 (citation omitted). It then added: "It would be an unprecedented step, however, to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress's authority to pursue federal objectives through the state judiciaries exceeds *not only* its power to press other branches of the State into its service *but even its control over the federal courts themselves*." *Id.* at 752-753 (emphases added). Here, Congress has not required state courts to adjudicate claims, or to apply rules, that would be beyond Congress's authority to impose on federal courts.

the limitations period while the claims are pending in federal court—that interferes with federal interests.

Although the State amici assert (Br. 17) that "no other federal law of which we are aware purports to regulate directly the litigation of purely *State-law* claims in State Court," Congress has from time to time done precisely that. It has exercised that authority under its bankruptcy power, 11 U.S.C. 108(c) (extending limitations periods while bankruptcy automatic stay is in effect plus 30 days), its war powers, see *Stewart*, *supra*; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. 525, and its Commerce Clause authority, see *Pierce County*, *supra*.

D. Finally, and contrary to the South Carolina Supreme Court, respondent and its amici suggest that Section 1367(d) is not "necessary" because litigants can avoid limitations periods by filing two lawsuits—one in state court and another in federal court—and seek to stay the former. See Resp. Br. 29; State Amici Br. 14 n.4; Council of State Gov'ts Br. 14 n.2. By requiring plaintiffs seeking a federal forum to secure their state claims by filing two different lawsuits based on the same common nucleus of facts, respondent's proposal would recreate the very sort of wasteful and duplicative litigation and filings that this Court's recognition of pendent jurisdiction and Congress's establishment of supplemental jurisdiction were designed to avoid. See pp. 10-11, *supra*; ALI Study, *supra*, at 453-454. Respondent and its amici, furthermore, offer no guarantee that, where such duplicate lawsuits are filed, stays will be granted. Thus, their proposal would require plaintiffs wishing to exercise their statutory right to a federal forum either to risk their state-law claims to a running limitations period, or to confront the possibility of having to litigate their claims simultaneously in two different courts. *Ibid.* Worse, if the state claims were to go to judgment first, the rule against claims splitting might give the state court judgment preclusive effect in the federal

action, effectively depriving the plaintiff of his statutory right to a federal forum.[8]

Respondent, moreover, nowhere explains how the filing of an additional, duplicate, state-court lawsuit would serve any conceivable purpose not served by the timely filing of the federal action. Respondent does not dispute that, had this suit been filed in state rather than federal court in the first instance, it would have been timely and proceeded on the merits. And that would have been true even if the action had been temporarily dismissed, as occurred here. Under South Carolina law, an amended complaint "relate[s] back to the commencement of the action" and is "not affected by the intervening lapse of time," so long as it does not "set up * * * a wholly different cause of action." *DeLoach* v. *Griggs*, 72 S.E. 2d 647, 649 (S.C. 1952).[9]

---

[8] Although respondent asserts (Br. 29) that "there is no South Carolina law prohibiting claim-splitting," respondent appears to misunderstand South Carolina law. Like most jurisdictions, South Carolina appears to follow the rule that "a single cause of action * * * cannot be split up or divided so as to be made the subject of different actions. If this is done and separate actions are brought for different parts of such a demand the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the others." *Lawton* v. *New York Life Ins. Co.*, 186 S.E. 909, 910 (S.C. 1936) (citation omitted). The rule thus "prohibits the owner of a single cause of action from either dividing or splitting the cause of action so as to make it the subject of several causes of action unless the party against whom the cause of action exists consents thereto." *Nunnery* v. *Brantley Constr. Co.*, 345 S.E. 2d 740, 743 (S.C. Ct. App. 1986). Although it is possible that federal courts might adopt a rule of federal common law or a construction of 28 U.S.C. 1738 to ameliorate the interference with federal rights that could result, that is not a basis for deeming "unnecessary" a federal statute specifically designed to prevent that injury.

[9] In *DeLoach*, the South Carolina Supreme Court held that the statute of limitations did not preclude the filing of an amended complaint where the original complaint was properly dismissed for failure to plead the location of the accident. Giving the appellant 20 days to amend, the court stated that the "amendment will relate back to the commencement of the action," because it would not require the defendant "to answer a different legal liability from that originally stated in the complaint." 72 S.E.2d at 652. See *Scott* v. *McCain*, 250 S.E. 2d 118, 121 (S.C. 1978) (The "rule stated in *Deloach* v. *Griggs* * * * is applicable" to amended complaint that adds malice allegation in libel suit, because it "does not state a cause of action" that is "new []or different from the cause of action alleged in the original complaint").

Respondent offers no persuasive reason why the State needs to apply a different rule where the suit is filed in federal rather than state court in the first instance. No less than a timely state-court action, a timely lawsuit in federal court serves the purposes of the limitations period, providing prompt notice of the claimed violation and potential liability. See *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (identifying purposes of limitations periods); *Felder* v. *Casey*, 487 U.S. 131, 137 (1988) (purposes of notice-of-claim requirement). To the extent respondent relies on an (unarticulated) state interest in prompt judicial resolution of state-law claims, its (and its amici's) suggestion that state-court suits be stayed pending the federal action, Resp. Br. 29; State Amici Br. 14 n.4; Council of State Gov'ts Br. 14 n.2, would have precisely the same effect on that interest as Section 1367(d). And respondent nowhere asserts that Section 1367(d) interferes with any other objective served by the limitations period. Respondent's claimed interest thus boils down to an asserted right to treat petitioner less favorably—by barring his lawsuit as "affected by the intervening lapse of time"—simply because petitioner originally filed it in federal rather than state court. That is precisely the sort of policy that Congress has authority to redress.[10]

Even if the filing of multiple lawsuits were a marginally acceptable alternative to Section 1367(d), the Necessary and Proper Clause does not embody a least restrictive alternative requirement or limit Congress to enacting only that legislation which is "absolutely or indispensably necessary" to the effectuation of its express powers. *M'Culloch*, 17 U.S.

---

[10] Indeed, it is difficult to conceive of a legitimate state interest that may be served by requiring the filing of multiple lawsuits, followed by a stay to prevent the progress of the state action in favor of the federal action.

(4 Wheat.) at 414, 421. Instead, that clause encompasses all legislation that is "convenient, or useful," or "calculated to produce the end." *Ibid.* In any event, the alternative posited by respondent and its amici is clearly inferior. It requires the potentially unnecessary filing of multiple lawsuits, introduces greater uncertainty and cost, and would often prove a trap for the unwary. Here, Congress concluded that Section 1367(d) was the most sensible way of ensuring that plaintiffs seeking a federal forum would not have to risk their state-law claims, while properly regulating the circumstances under which federal courts address such claims. That respondent can identify a less efficacious, more cumbersome (and less equitable) method does not undermine the wisdom of Congress's judgment or its constitutional authority. See *M'Culloch*, 17 U.S. (4 Wheat.) at 415-416, 421.

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2003

Supreme Court, U.S.
FILED
DEC 5 2002

(5)

No. 02-258

IN THE
SUPREME COURT OF THE UNITED STATES

SUSAN JINKS,

Petitioner,

V.

RICHLAND COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BARBARA ARNWINE
THOMAS J. HENDERSON*
JONATHAN P. HOOKS

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

* Counsel of Record

31 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 3

ARGUMENT 7

I. THE SOUTH CAROLINA SUPREME COURT ERRED BECAUSE, WITH RESPECT TO CLAIMS AGAINST POLITICAL SUBDIVISIONS OF STATES, SECTION 1367(d) DOES NOT IMPLICATE AFFIRMATIVE LIMITS ON CONGRESSIONAL POWER UNDER EITHER THE ELEVENTH OR TENTH AMENDMENT 7

A. The Eleventh Amendment sovereign immunity of the States is not implicated in this case because § 1367(d) is being applied to the political subdivision of the State as a party to the lawsuit and not the State itself 7

B. This case does not implicate the concerns that have motivated the Court, under the authority of the Tenth Amendment, to hold congressional legislation unconstitutional or to apply the clear-statement test 10

II. THE PROVISION IN ARTICLES I AND III FOR A SYSTEM OF FEDERAL COURTS PROPERLY INCLUDES CONGRESSIONAL AUTHORITY TO EFFICIENTLY REGULATE SUCH COURTS IN THEIR INTERRELATIONSHIPS WITH STATE COURTS 13

A. When Congress acts pursuant to Article III, the Necessary and Proper Clause, and the Supremacy Clause, the law should be upheld as long as it is consistent with other provisions of the Constitution and is a rational means of achieving a legitimate end 16

B. Section 1367(d) is a constitutional exercise of Congress's authority under Article III and the Necessary and Proper Clause because it is rationally related to the protection of unfettered access to the original jurisdiction of the federal courts and the otherwise efficient regulation of federal court jurisdiction and practice 17

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Mineta,
534 U.S. 103 (2001) 1

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 1

Alden v. Maine,
527 U.S. 706 (1999) ..... *passim*

Beers v. Arkansas,
61 U.S. 527 (1858) 5,7

Brazinski v. Amoco Petroleum Additives Co.,
6 F.3d 1176 (7th Cir. 1993) 17

Brewer v. City of El Cerrito,
666 F. Supp. 1346 (N.D. Cal. 1987) 21

Burns-Toole v. Byrne,
11 F.3d 1270 (11th Cir. 1994) 22

City of Los Angeles v. Superior Court,
85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978) 18

Conn. Nat'l Bank v. Rytman,
94 A.2d 1246 (Conn. 1997) 19

Conroy v. Aniskoff,
507 U.S. 511 (1993) 15

Duckworth v. Franzen,
780 F.2d 645 (7th Cir. 1985),
cert. denied, 479 U.S. 816 (1986) 22

Equity Res. Mgmt. v. Vinson,
23 So. 2d 634 (Ala. 1998) 19

Felder v. Casey,
487 U.S. 131 (1988) 8,14,18

Fin. Gen. Bankshares, Inc. v. Metzger,
680 F.2d 768 (D.C. Cir. 1982) 21

Fullilove v. Klutznick,
448 U.S. 448 (1980) 1

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 10

Garrett v. Moore-McCormack Co.,
317 U.S. 239 (1942) 14

Gregory v. Ashcroft,
501 U.S. 452 (1991) 10,11

Hanna v. Plumer,
380 U.S. 460 (1965) ..... *passim*

Henson v. Columbus Bank & Trust Co.,
651 F.2d 320 (5th Cir. 1981) 20

Int'l Games, Inc. v. Sims,
44 N.E.2d 736 (Ill. 1982) 18

Jinks v. McCauley,
No. 98-1003, 1998 U.S. App.
LEXIS 21462 (4th Cir. Sept. 1, 1998) 3

Jinks v. Richland County,
63 S.E.2d 104 (S.C.),
cert. granted, 2002 U.S. LEXIS 7794
(U.S. Oct. 21, 2002) ..... *passim*

L.A. Draper & Son v. Wheelabrator-Frye, Inc.,
735 F.2d 414 (11th Cir. 1984) 20,21,22

Mayor v. Cooper,
73 U.S. (6 Wall.) 247 (1867) ..... *passim*

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 16

McNeal v. Paine, Webber, Jackson & Curtis, Inc.,
93 S.E.2d 331 (Ga. 1982) 19

Metro Broad., Inc. v. FCC,
497 U.S. 547 (1990) 1

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 16

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 7,8

Musher Found. v. Alba Trading Co.,
127 F.2d 9 (2d Cir. 1942) 19

Nevada v. Hall,
440 U.S. 410 (1979) 5,7

Nev. Dep't of Human Res. v. Hibbs,
122 S. Ct. 2618 (2002) 1

New York v. United States,
505 U.S. 144 (1992) ..... *passim*

Newman v. Burgin,
930 F.2d 955 (1st Cir. 1991) 20

Notrica v. Bd. of Supervisors,
925 F.2d 1211 (9th Cir. 1991) 20

O'Brien v. Cont'l Ill. Nat'l Bank & Trust Co.,
593 F.2d 54 (7th Cir. 1979) 20,22

Pharo v. W.L. Smith,
625 F.2d 1226 (5th Cir. 1980) 20

Prater v. United Mine Workers,
793 F.2d 1201 (11th Cir. 1986) 20

Printz v. United States,
521 U.S. 898 (1997) ..... *passim*

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002) ..... *passim*

Saulsberry v. Atl. Richfield Co.,
673 F. Supp. 811 (N.D. Miss. 1987) 21

Tennessee v. Davis,
100 U.S. 257 (1879) 14

United Mine Workers v. Gibbs,
383 U.S. 715 (1966) 17,21

Weaver v. Hood,
77 So. 2d 440 (Ala. 1991) 18

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 1 ..... *passim*

U.S. Const. art. I, § 8 ..... *passim*

STATUTES

11 U.S.C. § 108(c) 15

15 U.S.C. § 6606(e)(4) 15

28 U.S.C. § 1367 ..... *passim*

42 U.S.C. § 1983 4

50 U.S.C. App. § 501 *et seq* 15

50 U.S.C. App. § 525 .....

S.C. Code §§ 15-78-10 to 200 (Supp. 2001) 4

MISCELLANEOUS

American Law Institute,
Study of the Division of Jurisdiction Between State and Federal Courts (1968) 19

18 Moore's Federal Practice 3d,
§ 131.21(3)(d)(i) 19

Patrick D. Murphy,
A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367, 78 Marq. L. Rev. 973 (1995) 17

Herbert Wechsler,
Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Probs. 216 (1948) 19

STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") submits this brief as *amicus curiae*, with the consent of the parties,[1] in support of Petitioner's argument that 28 U.S.C. § 1367(d) -- which tolls the statutes of limitations applicable to supplemental state-law claims while those claims are pending in federal court -- may constitutionally be applied in tort cases against the political subdivisions of the State.[2]

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Toward that end, the Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before this Court involving the authority of Congress to act under the powers delegated to it under the Constitution. *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 122 S. Ct. 2618 (2002) (granting cert.); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

---

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae*, its staff, or its counsel made a monetary contribution for the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Section 1367(d) states, in relevant part, "The period of limitations for any claim asserted under [supplemental jurisdiction] . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."

SUMMARY OF ARGUMENT

The Supreme Court of South Carolina erred in applying this Court's Eleventh Amendment precedent respecting the immunity of States from suits to limit congressional authority to determine the circumstances under which political subdivisions of a State can be subject to suit. The court below erroneously conflated a State's legislative authority to determine whether and when its political subdivisions may be subject to suit with the Eleventh Amendment sovereignty interest of a State in not being answerable as a party in a lawsuit. The decision under review completely misapplied this Court's decision in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), with respect to its holding, the underlying constitutional interests, and the questions it expressly did not reach.

The South Carolina Supreme Court also erred in analyzing 28 U.S.C. § 1367(d) under this Court's Tenth Amendment precedent. Although recognizing that § 1367(d) is "necessary" legislation for the regulation of the jurisdiction of the federal courts and, therefore, an exercise of Congress's expressly delegated powers under Articles I and III of the Constitution, the court nevertheless held that § 1367(d) impermissibly intruded on the sovereign interests of States. In this respect, the court failed to recognize that the circumstances in which the Tenth Amendment imposes judicially enforceable limitations on the delegated powers of Congress are rare, and that, more specifically, § 1367(d) neither affects the composition of State government nor commandeers State legislative or executive functions.

Congress enacted § 1367(d) pursuant to powers expressly conferred by Articles I and III of the Constitution, in combination with the Supremacy Clause and the Necessary

and Proper Clause, to regulate the jurisdiction of the federal courts and manage the relations between the federal and state courts under the Constitution's dual judicial system. As such, that legislation is subject to this standard. Section 1367(d) easily satisfies rational basis review as it is rationally related to interests in preserving the choice of a federal forum for determination of federal claims and providing for the rational and efficient regulation of the jurisdiction of the federal courts.

STATEMENT OF THE CASE

On October 14, 1994, Carl Jinks ("Mr. Jinks") was found to be in contempt of court for failure to pay $1500 in child support. *Jinks v. McCauley*, No. 98-1003, 1998 U.S. App. LEXIS 21462, at *2 (4th Cir. Sept. 1, 1998) (unpublished table decision). Pending payment, Mr. Jinks was confined in the Richland County Detention Center (the "County"). Before his incarceration, Mr. Jinks informed the sentencing court that he was an alcoholic and was suffering from withdrawal symptoms. In response, the court instructed Mr. Jinks to seek medical attention once he arrived at the jail. *Id.*

Three days later, a guard observed Mr. Jinks shaking, sweating profusely, laughing, and clutching the bars of his cell. Mr. Jinks was then brought to the jail's physician, who determined that he was suffering from Stage II alcohol withdrawal. The physician prescribed medication to treat the symptoms and ordered that Mr. Jinks be kept under observation. *Id.* at *3. At 9:30 a.m. of Mr. Jinks's fourth day in jail, before the prescription arrived, guards at the county jail observed that Mr. Jinks was sitting upright and wasn't shaking, sweating, or laughing anymore. An hour later, when placing other inmates in the cell, County guards discovered that Mr. Jinks was dead. *Id.* at *4.

In June of 1996, Susan Jinks ("Mrs. Jinks"), Mr. Jinks's wife, brought suit against the County in federal district court, asserting claims under 42 U.S.C. § 1983 and the Eighth Amendment. *Id.* Mrs. Jinks also invoked the court's supplemental jurisdiction and alleged state claims of outrage and negligence under the South Carolina Tort Claims Act, S.C. Code §§ 15-78-10 to -200 (Supp. 2001).

In December 1997, the district court granted summary judgment to the defendant on Mrs. Jinks's § 1983 claim and then declined, pursuant to 28 U.S.C. § 1367(c)(3), to exercise jurisdiction over Petitioner's remaining state claims. *See Jinks v. Richland County*, 563 S.E.2d 104, 105 (S.C.), *cert. granted*, 2002 U.S. LEXIS 7794 (U.S. Oct. 21, 2002) 2002). Approximately two weeks later, Mrs. Jinks filed in state court, alleging the wrongful death and survival action currently before the Court. *Id.* By the time of her state filing, the two-year statute of limitations for Mrs. Jinks's claims would have passed had she not timely filed in federal court. *See* S.C. Tort Claims Act, § 15-78-100(a). Thus, Mrs. Jinks argued that her claims were timely under the authority of § 1367(d), which tolls state statutes of limitations during the exercise of federal court jurisdiction. After trial, Mrs. Jinks was awarded $80,000 in damages.

On appeal, the South Carolina Supreme Court reversed the verdict, holding that 28 U.S.C. § 1367(d) impermissibly infringed upon South Carolina's sovereignty in violation of the Tenth Amendment to the United States Constitution. *Jinks*, 563 S.E.2d at 108-09. More specifically, the court held that Congress does not have the power to enact legislation, if it conflicts with State law regarding the statutory immunity of the State's political subdivisions, to protect unfettered access to federal courts and to aid in the efficient regulation of federal court jurisdiction. *Id.* at 107.

With respect to the Tenth Amendment, the South Carolina Supreme Court acknowledged that "if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* at 106 (quoting *New York v. United States*, 505 U.S. 144, 156 (1992)). The *Jinks* court then answered in the affirmative the question "whether [§ 1367(d)] is within Congress' power as . . . enumerated in the Constitution," *id.* at 106, and concluded that it "is a useful aid to the exercise of federal jurisdiction, and, therefore, is necessary within the meaning of the Necessary and Proper Clause." *Id.* at 107 (internal quotation omitted). However, the court decided that "§ 1367(d) is not 'proper' within the meaning of the Necessary and Proper Clause . . . [because] the tolling provision interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit." *Id.*

The South Carolina Supreme Court reached this result by purporting to apply this Court's Eleventh Amendment decisions regarding the ability of States to determine whether they consent to suits against themselves in State courts. *Alden v. Maine*, 527 U.S. 706 (1999); *Nevada v. Hall*, 440 U.S. 410 (1979); *Beers v. Arkansas*, 61 U.S. 527 (1858). In particular, the South Carolina Supreme Court relied upon *Raygor*: "Most recently, the United States Supreme Court recognized that 'although we have not addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, who can say that the notion at least raises serious constitutional doubt.'" *Jinks*, 563 S.E.2d at 108 (quoting *Raygor*, 534 U.S. at 543). The court below then referred to South Carolina's determination of the

liability of its political subdivisions under its Tort Claims Act. It then concluded that

> § 1367(d) potentially exposes political subdivisions to litigation and liability after the limitations period *established by the State* has expired. Accordingly, in tort actions against political subdivisions, § 1367(d) extends the waiver of the sovereign immunity of political subdivisions, thereby interfering with the State's sovereignty in violation of the Tenth Amendment and the Necessary and Proper Clause."

Id. at 108 (emphasis added). Relying on *Raygor*, the court concluded that the tolling provisions of § 1367(d) "does not apply" in the circumstances of this case. *Id.*

In so holding, the South Carolina Supreme Court determined that the State's interests here were paramount to the federal interests in preserving a federal forum for federal claims and regulating the jurisdiction of the federal courts: "As a practical matter, we recognize our decision may affect a plaintiff's decision to pursue a tort action against a political subdivision in federal court. We conclude, however, that a party's ability to choose its forum should not prevail over the State's sovereign authority to establish the terms under which its political subdivisions may be sued." *Id.*

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT ERRED BECAUSE, WITH RESPECT TO CLAIMS AGAINST POLITICIAL SUBDIVISIONS OF STATES, SECTION 1367(d) DOES NOT IMPLICATE AFFIRMATIVE LIMITS ON CONGRESSIONAL POWER UNDER EITHER THE ELEVENTH OR THE TENTH AMENDMENT

A. The Eleventh Amendment sovereign immunity of the States is not implicated in this case because § 1367(d) is being applied to a political subdivision of the State as a party to a lawsuit and not to the State itself

The manifest error of the South Carolina Supreme Court is its mistaken reliance on Eleventh Amendment precedent regarding the immunity of the *States* as parties as a limitation on the power of Congress to effect suits against *political subdivisions* of States. *See Jinks*, 563 S.E.2d at 107-09 (citing *Alden*, 527 U.S. at 749); *Raygor*, 534 U.S. 533.[3] The Eleventh Amendment imposes limits upon the authority of Congress to make unconsenting States amenable to suits in federal or state court, but represents no such limit with respect to local governments. *See Alden*, 527 U.S. at 756 ("[An] important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (same).

---

[3] The court also cited to *Nevada*, 440 U.S. at 414, and *Beer*, 61 U.S. 527, but these cases neither implicate nor discuss Eleventh Amendment limitations on congressional power.

The South Carolina Supreme Court's error may be attributable to its conflation of the Eleventh Amendment limitation on when states may be made to appear as parties answerable in a lawsuit with the legislative authority to decide when and under what circumstances its political subdivisions may be subject to suit. In other words, the court characterizes, as an attribute of sovereignty, the state's decisions with respect to the immunity of its political subdivisions as though that equated them with sovereign immunity under the Eleventh Amendment. Specifically, the court consistently characterized the State Tort Claims Act as: "the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit," *Jinks*, 563 S.E.2d at 107; "the State's sovereign authority to establish the terms under which its political subdivisions may be sued," *id.* at 108; "the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions," *id.* Calling decisions about immunity an aspect of sovereignty, however, does not convert them into interests encompassed within Eleventh Amendment sovereign immunity.

Supreme Court precedent speaks clearly on this issue -- when acting pursuant to an enumerated power, Congress can abrogate the immunity of the political subdivisions of a State and, to the extent that State law is inconsistent with a federal mandate, it "must yield to the federal right." *Felder v. Casey*, 487 U.S. 131, 143 (1988); *see also id.* ("The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the [State] Legislature, made, and it is a decision that *the State has no authority to override*." (emphasis added)); *Doyle*, 429 U.S. at 280 ("The bar of the Eleventh Amendment to suit in federal courts extends to States . . . but does not extend to counties and similar municipal corporations"). In other words, in

contrast to the lower court's holding, Congress can not only alter *the conditions* under which political subdivisions can be sued, but also the more foundational question of *whether* they can be sued at all. Congress can do so pursuant to the powers conferred to it by the Constitution, including Article III and the Necessary and Proper Clause.

Finally, while the South Carolina Supreme Court purports to rely on *Raygor*, its use of this decision is completely misplaced. In one if its citations to *Raygor*, *Jinks* notes the Court's *dicta* suggesting that it is doubtful whether § 1367(d) could constitutionally be invoked in suits *against the states*. By providing no other context to the quote, the South Carolina Supreme Court suggests that there is a strong analogy between *Raygor* and *Jinks*. However, *Raygor* explicitly stated, "We express *no view* on the application or constitutionality of § 1367(d) when a State consents to suit or *when a defendant is not a State*." 534 U.S. at 547 (emphasis added). Moreover, the court's analogy in *Jinks* is even more troublesome when one considers the fact that *Raygor* did *not* hold § 1367(d) unconstitutional on Eleventh Amendment grounds and instead decided the case based upon principles of statutory interpretation. Thus, not only was *Raygor* motivated by the Eleventh Amendment rather than the Tenth Amendment, but it also did not reach the ultimate constitutional question. In sum, the *Jinks* court used *Raygor* for a constitutional holding that was not made, in the context of an Amendment that was not at issue, and on a topic that the Court explicitly reserved.

B. This case does not implicate the concerns that have motivated the Court, under the authority of the Tenth Amendment, to hold congressional legislation unconstitutional or to apply the clear-statement test

The *Jinks* court did not and could not directly analogize the facts in this case to any of the Court's Tenth Amendment cases articulating the rare circumstances in which the Tenth Amendment imposes judicially enforceable limitations on the power of Congress. Given that § 1367(d) does not invoke any of these limitations, the appropriate guardian of the federal-state balance is "the structure of the Federal Government," and not the judicial branch. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

First, and most importantly, the South Carolina Supreme Court recognized that § 1367(d) is "necessary" legislation for the regulation of federal jurisdiction because it protects litigants' choice of a federal forum, relieves the burden on federal judges of unnecessarily deciding state claims, and manages the relations between federal and state courts in the handling of claims. Thus, there is no question that this is an exercise of Congress's delegated powers under Articles I and III, and, therefore, is not a power reserved to the States. *See New York v. United States*, 505 U.S. 144, 156 (1992).

Second, the South Carolina Supreme Court found that § 1367(d) was not a proper means of addressing Congress's interests because it impermissibly infringed on State's sovereignty. It drew this conclusion despite the fact that § 1367(d) does not intrude upon the distinctive sovereignty interests identified in this Court's decisions. For example, in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court held, on the basis of statutory interpretation, that the Age Discrimination in Employment Act of 1967 ("ADEA") did

not apply to state court judges who faced mandatory retirement under the Missouri constitution. The Court applied a restrictive method of statutory construction, the clear-statement test, because it did not want to assume that Congress intended to control the composition, and thus the essence, of state governments. *See id.* at 460 ("[The application of the ADEA to the State judiciary] goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise governmental authority, a State defines itself as a sovereign."). Section 1367(d), in contrast, does not even have a remote relationship to such serious concerns. It in no way controls the composition of state governments and, instead, merely protects the original jurisdiction of the federal courts. As such, *Gregory* neither suggests that § 1367(d) is unconstitutional nor does it suggest that the restrictive clear-statement rule need apply.

Importantly, § 1367(d) also does not fall within that narrow set of circumstances in which the Court has found Congress to have commandeered the legislative or executive functions of the States. *See New York*, 505 U.S. 144 (holding that the Tenth Amendment and principles of state sovereignty prohibit Congress from compelling the States to enact regulations according to its instructions); *Printz v. United States*, 521 U.S. 898 (1997) (finding unconstitutional the Brady Handgun Control Act, which required state and local law enforcement personnel to conduct background checks before issuing permits for firearms). For example, in *New York*, Congress enacted a statute that compelled the States to regulate the disposal of radioactive waste in a manner directed by Congress. As a result, the Court worried that when "the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised

the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 145-46.

In contrast, § 1367(d) does not diminish the accountability of either sovereign. When a state court applies a federal law, as they often do, it is perfectly clear which sovereign promulgated the law. *See Printz*, 521 U.S. at 907 ("It is understandable why [state] courts [have historically] been viewed distinctively . . . ; unlike legislatures and executives, they appl[y] the law of other sovereigns all the time."); *Alden*, 527 U.S. at 752 (noting that Congress "may declare federal law binding and enforceable in state courts"). In other words, there can be no doubt, since the plaintiff cited the statute, that Richland County knew which sovereign was responsible for tolling the statute of limitations while federal proceedings were pending.

In *Printz*, the Court articulated the same concern by holding that Congress cannot conscript state executive officers into the service of a federal regulatory program. 521 U.S. at 942-43. Again, § 1367(d) does no such thing and instead only requires the application of federal law in state court to protect "the right and duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals." *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). As such, the concerns that motivated *New York* and *Printz* simply do not apply to this case.

Furthermore, a critical flaw in the South Carolina Supreme Court's position is that it does not recognize that, in comparison to the role of the state legislative and executive branches in our federal system, the role of state courts is *sui generis*. The unique position of state judiciaries derives from the Madisonian Compromise -- the Constitution

provided for a Supreme Court but left the formation of lower federal courts to the will of Congress. *See Printz*, 521 U.S. at 907. Since a lower federal court system is optional, it has long been recognized that "state courts [are] peculiarly amenable to federal command" and that "the Supremacy Clause imposes specific obligations on state judges." *Alden*, 527 U.S. at 753; *see also Printz*, 521 U.S. at 907 ([E]arly laws establish . . . that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."). For example, Congress can even preempt state procedural law in state courts if the application of the law would "burden the exercise of [a] federal right." *Id.* at 141. In addition, by forming lower federal courts, Congress was entitled to manage the jurisdictional and procedural complications that the formation of a second judicial system imposed. *See, e.g., Hanna v. Plumer*, 380 U.S. 460 (1965). Thus, to the extent that § 1367(d) compels state judges to enforce federal law in furtherance of its Article III power, the Tenth Amendment is not implicated.

II. THE PROVISION IN ARTICLES I AND III FOR A SYSTEM OF FEDERAL COURTS PROPERLY INCLUDES CONGRESSIONAL AUTHORITY TO EFFICIENTLY REGULATE SUCH COURTS IN THEIR INTERRELATIONSHIPS WITH STATE COURTS

Articles I and III grant Congress the discretionary authority to establish a system of federal courts to exist concurrently with state judicial systems. *See* U.S. Const. art. III, § 1; U.S. Const. art. I, § 8, cl. 9. This authority, in combination with the Supremacy Clause and the Necessary and Proper Clause, empowers Congress to regulate the interrelationship between federal and state court systems in

at least two important ways, which, as will be demonstrated, provide ample authority to enact § 1367(d).

First, and most importantly, Congress may act to protect the original jurisdiction of the federal courts, or, in other words, to preserve its prerogative to have federal claims adjudicated in its own courts. *See Cooper*, 73 U.S. (6 Wall.) at 251-52 ("It is the right and duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals"). Accordingly, Congress is entrusted with the discretion to determine which cases the federal courts will hear and the circumstances under which they will do so. *See id.* ("How jurisdiction shall be acquired by the inferior courts . . . and the manner of procedure in its exercise after it has been acquired . . . [are questions] remitted without check or limitation to the wisdom of the legislature."). Second, Congress can regulate state court practice to prevent the adulteration or dilution of federal rights, s*ee Felder*, 487 U.S. at 151 ("[T]he Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942)), and to enforce federal rights within the states' own courts, *Printz*, 521 U.S. at 907 ("[T]he Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions." (emphasis removed)).

For example, to ensure that federal law is interpreted and applied in a federal forum, Congress may permit parties to take the extraordinary step of stripping a case out of state court. *See Tennessee v. Davis*, 100 U.S. 257, 272 (1879) (holding that the "division of sovereignty over certain matters" justifies Congress's authorization of the removal of a state crime from a state court because of the presence of a

federal issue); *Cooper*, 73 U.S. (6 Wall.) at 253 (noting that if a single federal question exists in a mass of state claims, it "is decisive upon the subject of jurisdiction" if Congress so chooses). In addition, when state law is being applied in federal court, Congress can supplant state procedural rules with its own, even if doing so has significant substantive consequences. *See Hanna*, 380 U.S. at 472 ("[T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."). Finally, Congress has provided procedural rights to individuals that must be enforced in state court pursuant to substantive powers other than Article III that have not encountered serious constitutional question.[4] For example, this Court has long enforced the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 501 *et seq.*, which tolls a variety of the civil liabilities of military personnel. *See Conroy v. Aniskoff*, 507 U.S. 511 (1993).

---

[4] *Amicus curiae* believes that the case law makes it abundantly clear that Congress can mandate that a state claim that was timely filed in federal court be deemed timely if filed in state court soon thereafter. The arguments for this position follow. However, *amicus curiae* takes no position on the extent to which Congress can regulate state court procedures when not acting pursuant to its Article I and III judicial powers, s*ee, e.g.*, Y2K Act, 15 U.S.C. § 6606(e)(4) (providing for tolling for Year 2000-related claims). Such issues are better addressed when the Court is presented with them. Nevertheless, it is worth noting that if Congress lacked the authority to enact § 1367(d) when both Article I and Article III were involved to the extent they are in this case, it would be difficult to imagine that it could do so when Congress only acts pursuant to Article I. Therefore, this decision will either cast grave constitutional doubt on the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. § 525, the Y2K Act, and the 30-day savings period provided for in bankruptcy law, 11 U.S.C. § 108(c), or will leave these issues for adjudication at a later date.

A. When Congress acts pursuant to Article III, the Necessary and Proper Clause, and the Supremacy Clause, the law should be upheld as long as it is consistent with other provisions of the Constitution and is a rational means of achieving a legitimate end

Because the power to regulate the jurisdiction, practice, and procedures of the federal courts derives from the Necessary and Proper Clause, the standard of review for congressional legislation is the rational-means test articulated in Chief Justice Marshall's seminal opinion *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See also Hanna*, 380 U.S. at 472 (citing *McCulloch* for review of exercise of Article III power). According to *McCulloch*, the words "[n]ecessary and proper" were inserted into the Constitution as part of the enumeration of powers of Congress, not among the limits, "to remove all doubts respecting the right [of Congress] to legislate on [the] vast mass of incidental powers . . . involved in the Constitution." 17 U.S. (4 Wheat.) at 321.

As such, the Court applies the following highly deferential test when reviewing legislation enacted pursuant to the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* Thus, if the means chosen by Congress is rationally related to a legitimate, constitutional end, then the Court should inquire no further into a legislative decision. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (sustaining a milk packaging regulation under the "rational basis" test).

B. Section 1367(d) is a constitutional exercise of Congress's authority under Article III and the Necessary and Proper Clause because it is rationally related to the protection of unfettered access to the original jurisdiction of the federal courts and the otherwise efficient regulation of federal court jurisdiction and practice

Congress enacted the "supplemental jurisdiction" statute, 28 U.S.C. § 1367, in 1990 pursuant to recommendations of the Federal Courts Study Committee to improve federal court practice by codifying the former judge-made doctrines of pendent, ancillary, and pendent-party jurisdiction. *See Raygor*, 534 U.S. at 539-40; *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-82 (7th Cir. 1993); *see also* Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 Marq. L. Rev. 973, 973-74 (1995). For example, § 1367(a)[5] codified the old doctrine of pendent jurisdiction, which allowed a party bringing federal claims to join state-law claims against the same defendant if they arose from a common nucleus of operative facts. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Subsection (d) facilitates parties' use and the efficient administration of the grant of jurisdiction Congress provided to the federal courts in subsection (a). The rational relationship between the means chosen -- tolling the statutes of limitations applicable to supplemental state-law claims while those claims are pending in federal court -- and the above-noted end -- the preservation of unfettered access to the federal courts and the efficient regulation of federal court jurisdiction and practice -- is established by a number of federal interests.

---

[5] Section 1367(a) states, in relevant part, "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part

First, § 1367(d) protects the availability of a federal forum for litigants by removing state-imposed burdens on the use of that forum when parties have state and federal claims arising out of the same nucleus of operative facts. Specifically, unless parties are certain beyond any doubt that their federal claims are viable, they will face the risk that their choice of a federal forum, in the absence of tolling, will result in their inability to prosecute their state claims. This is due, in part, to the fact that many states do not permit plaintiffs to split their claims between federal and state courts.[6] Thus, when parties file in federal court, they will be forced to bring their state claims as well, creating the distinct possibility that they will find themselves in Mrs. Jinks's position -- the price tag on her initial decision to use a federal forum was $80,000.[7] If attorneys foresee this possibility, it will, absent exigent circumstances, likely be determinative of their choice of forum. As such, state limitations law "discriminates against the federal right" to use the original jurisdiction of the federal courts. *Felder*, 487 U.S. at 141.

Second, even if parties attempt to bring their federal and state claims sequentially, rather than simultaneously, in

---

of the same case or controversy under Article III of the United States Constitution."

[6] *See, e.g.*, *Weaver v. Hood*, 577 So. 2d 440, 442 (Ala. 1991) ("This Court has consistently refused to allow a person to prosecute an action in a state court while another action on the same cause and against the same parties is pending in a federal court in this State."); *Int'l Games, Inc. v. Sims*, 444 N.E.2d 736 (Ill. 1982); *City of Los Angeles v. Superior Court*, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978).

[7] If state law created such powerful disincentives to bringing cases in federal courts, it would raise important constitutional questions about the validity of the underlying state laws. In *Raygor*, the Court noted the possibility, without expressing an opinion, that § 1367(d) remedied violations of the Due Process Clause. *See* 534 U.S. at 546.

federal and state court, they will likely be foreclosed from pursuing this avenue as well. *See* 18 Moore's Federal Practice 3d, § 131.21(3)(d)(i), p. 131-49 ("If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law.").[8] In other words, absent tolling, parties that wish to guarantee that all of their claims will get a day in court have only one option -- foregoing their right to a federal forum.

Third, even if parties could pursue their federal and state claims in separate court systems, it would be costly and inefficient for the parties to do so for no other reason than to avoid the expiration of a statute of limitations, which imposes an additional burden on the use of a federal forum. *See Musher Found., Inc. v. Alba Trading Co.*, 127 F.2d 9, 11 (2d Cir.) ("If the roast must be reserved . . . for the federal bench, it is anomalous to send the gravy across the street to the state court house."), *cert denied*, 317 U.S. 641 (1942); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 232 (1948) ("There is vice . . . , as we have recognized by liberal rules of joinder, in forcing plaintiffs who have multiple bases of action to pursue their remedies in pieces and in different courts."); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, 454 (1968) ("[I]t is clearly in the interest of sound judicial administration to adopt a procedure under which a plaintiff need not file simultaneous actions in two courts in order to ensure that his action will not be barred by the statute of limitations following a dismissal in one of them"). To avoid this

---

[8] *See, e.g.*, *Equity Res. Mgt. v. Vinson*, 723 So. 2d 634, 639 (Ala. 1998); *Conn. Nat'l Bank v. Rytman*, 694 A.2d 1246, 1256-57 (Conn. 1997); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 293 S.E.2d 331 (Ga. 1982).

inefficiency, one could expect parties to forego the use of the federal courts to the extent practicable, thereby minimizing the transaction costs associated with their litigation. As such, the above three disincentives to the use of the original jurisdiction of federal courts all invoke "the right and duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals" and invite a legislative solution. *Cooper*, 73 U.S. (6 Wall.) at 253.

The fourth reason § 1367(d) is a rational means for Congress to promote the efficient administration of the federal courts in our dual system of judicial governance is that, in the absence of § 1367(d), the federal courts are likely to be burdened with a greater number of state claims between citizens of the same state, even after any federal issues have been resolved. This is because, prior to the enactment of § 1367(d), it was widely recognized that an important factor for federal courts to consider in the exercise of their discretion over whether to dismiss residual state claims was whether the plaintiff would inequitably be foreclosed from proceeding in state court by the expiration of the state statute of limitations.[9] For some courts, this factor was so important that they imposed a mandatory rule requiring retention of state claims if a plaintiff was faced with such an inequity.[10]

---

[9] *See, e.g., Notrica v. Bd. of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991); *Newman v. Burgin*, 930 F.2d 955, 963 (1st Cir. 1991); *Prater v. United Mine Workers*, 793 F.2d 1201, 1208 (11th Cir. 1986); *Pharo v. W.L. Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980).

[10] *See L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984); *Henson v. Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981) (per curiam); *O'Brien v. Cont'l Ill. Nat'l Bank & Trust Co.*, 593 F.2d 54, 65 (7th Cir. 1979).

If federal courts are forced unnecessarily to retain state court claims, it will impair the efficient administration of our dual system of judicial governance because, for example, "federal courts are not authorized expositors of state law [and] there is no mechanism by which their errors in such matters can be corrected on appeal by state courts." Wechsler, at 232; *see also Gibbs*, 383 U.S. at 726 ("Needless decisions of state law should be avoided . . . to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."). In addition to the problems of expertise and the unavailability of appeal to a final arbiter of state law, the unnecessary retention of state claims by the federal courts also intrudes upon the interests of the States in expounding their own law. *See id.* (noting that federal courts should avoid, when possible, decisions of state law "as a matter of comity"). Thus, even if the federal courts have the constitutional right to decide state claims after dismissing federal issues on a case, Congress may prudently act to minimize the frequency with which this occurs, both to limit the needless expansion of the federal court system and to respect the sovereign interests of the component states of our union.

Fifth, § 1367(d) is a prudent rule because it replaced inconsistent and unsatisfactory *ad hoc* solutions with a consistent and simple one. For example, prior to the enactment of § 1367(d), some federal courts would refuse to dismiss a plaintiff's state claims unless the defendant would agree to waive any objections to the timeliness of the action in state court.[11] The most obvious problem with this method was that courts were unable to compel recalcitrant parties to agree to such waivers if they wished to remain in federal

---

[11] *L.A. Draper*, 735 F.2d at 430; *Fin. Gen. Bankshares, Inc. v. Metzger*, 680 F.2d 768 (D.C. Cir. 1982); *Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D. Cal. 1987); *Saulsberry v. Atl. Richfield Co.*, 673 F. Supp. 811, 816 (N.D. Miss. 1987).

court. *See, e.g., O'Brien*, 593 F.2d at 65. In such a situation, a defendant's choice of forum would trump sound principles of judicial administration. Additionally, a court could refuse to impose this type of leverage on the defendant, adding uncertainty to the question of whether a party could safely file in federal court in the first place. *See Burns-Toole v. Byrne*, 11 F.3d 1270, 1276 (11th Cir. 1994) (holding that refusal to retain jurisdiction was not an abuse of discretion despite the expiration of the state statute of limitations). Finally, in the absence of § 1367(d), federal judges needed to devote time and resources to interpreting state limitation law, the application of which was not always clear.[12]

It is beyond cavil that § 1367(d) is a rational means to preserve the original jurisdiction of the federal courts and to efficiently administer our dual system of judicial governance. Under its narrow tolling provisions, a party's choice to bring suit in federal court does not prejudice the potential to have any state claims heard and adjudicated, while only preserving claims that have already met the state statute of limitations. Furthermore, the toll allows federal courts to efficiently manage their dockets without getting unnecessarily entangled in the interpretation of state law. Finally, it provides a consistent and predictable rule that parties can anticipate and rely upon. As such, § 1367(d) is an important tool employed by Congress to efficiently manage the jurisdiction, practice, and procedure of the federal courts. This is a goal entrusted to Congress's judgment under Article III and the Necessary and Proper Clause. *See Hanna*, 380 U.S. at 472.

In sum, because the power to enact § 1367(d) is delegated to Congress under Article III and the Necessary

[12] *See, e.g., Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985) (noting uncertainties in state limitations law), *cert. denied*, 479 U.S. 816 (1986); *L.A. Draper & Son*, 735 F.2d at 430.

and Proper Clause, and because it does not violate any of the narrow extra-textual limits imposed on Congress's power by state sovereignty, the South Carolina Supreme Court erred by refusing to toll Mrs. Jinks's claims while her federal case was pending.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of South Carolina should be reversed.

December 5, 2002

Respectfully submitted,

BARBARA ARNWINE
THOMAS J. HENDERSON*
JONATHAN P. HOOKS

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

* Counsel of Record

Supreme Court, U.S.
FILED
JAN 15 2003
OFFICE OF THE CLERK

No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether Congress has power under Article III to require a state court to entertain a state law claim that is barred by the State's statute of limitations when the claim is first brought in federal district court under the supplemental jurisdiction statute, 28 U.S.C. § 1367.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
SECTION 1367(d) IS AN UNCONSTITUTIONAL ENCROACHMENT ON STATE SOVEREIGNTY	4
A. Congress Does Not Have A General Supervisory Authority Over The Tolling Rules Applicable to State-Created Causes Of Action Litigated In State Courts	7
B. Section 1367(d) Exceeds Congress's Powers Under the Constitution	15
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Alden v. Maine, 527 U.S. 706 (1999)	23
Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	*passim*
Board of Regents v. Tomanio, 446 U.S. 478 (1980)	4
Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807)	2, 10-11, 23
Brown v. Western R.R. Co. of Ala., 338 U.S. 294 (1949)	12
Burnett v. New York Cent. R.R. Co., 380 U.S. 424 (1965)	5, 29
City of Canton v. Harris, 489 U.S. 378 (1989)	14
Claflin v. Houseman, 93 U.S. (3 Otto) 130 (1876)	9-10
Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952)	12
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	13, 24
Felder v. Casey, 487 U.S. 131 (1988)	12, 27, 28
Gregory v. Ashcroft, 501 U.S. 452 (1991)	7
Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1945)	3, 24, 24-25
Hanger v. Abbott, 73 U.S. (6 Wall.) 532 (1867)	18
Hanna v. Plumer, 380 U.S. 460 (1965)	25, 26, 27
Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931)	12, 28
Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831)	3, 12-13, 21-22
Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820)	10
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	4
Kline v. Burke Constr. Co., 260 U.S. 226 (1922)	20
Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835)	9
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	7

TABLE OF AUTHORITIES—Continued

	Page
M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839)	4, 13, 21, 22
Midstate Horticultural Co. v. Pennsylvania R.R. Co., 320 U.S. 356 (1943)	29
Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916)	10
Mondou v. New York, N.H. & Hart. Ry. Co., 223 U.S. 1 (1912)	11, 12
New York v. United States, 505 U.S. 144 (1992)	8
Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944)	29
Printz v. United States, 521 U.S. 898 (1997)	7, 8
Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949)	25
Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002)	5, 16
Sibbach v. Wilson, 312 U.S. 1 (1941)	9
Stewart v. Kahn, 78 U.S. (11 Wall.) 493 (1871)	16-17
Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988)	26
Sun Oil Co. v. Wortman, 486 U.S. 717 (1988)	*passim*
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)	13
Tarble's Case, 80 U.S. (13 Wall.) 397 (1871)	2, 11, 13
Tennessee v. Davis, 100 U.S. (10 Otto) 257 (1880)	9
Testa v. Katt, 330 U.S. 386 (1988)	10, 12, 28
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	24
United States v. Lopez, 514 U.S. 549 (1995)	9
United States v. Morrison, 529 U.S. 598 (2000)	9
United States v. Mottaz, 476 U.S. 834 (1986)	5
U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)	8

TABLE OF AUTHORITIES—Continued

	Page
Walker v. Armco Steel Corp., 446 U.S. 740 (1980)	25, 25-26, 26, 27
Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953)	22
Wenatchee Produce Co. v. Great Northern Ry. Co., 271 F. 784 (E.D.Wash. 1921)	17
Wilson v. Garcia, 471 U.S. 261 (1985)	25
Constitutional Provisions, Statutes and Rules	
An Act In Relation To The Limitation Of Actions In Certain Cases, 13 Stat. 123 (1864)	16
All Writs Act, 28 U.S.C. § 1651(a)	18, 19
Anti-Injunction Act, 28 U.S.C. § 2283	18, 19
Federal Employers' Liability Act	
45 U.S.C. §§ 51 *et seq*	29
45 U.S.C. § 56	29
Fed. R. Civ. P. 1	26
Fed. R. Civ. P. 3	25
Fed. R. Civ. P. 41(a)	21
Judicial Improvements Act of 1990, § 310(a), Pub. L. No. 101-650, 104 Stat. 5089, 5114 (1990), codified at 28 U.S.C. 1367(d)	*passim*
S.C. Code Ann. Ch.3, §§ 15-3-20 *et seq.*	5
§ 15-3-40	6
§ 15-3-100	17-18, 18
South Carolina Tort Claims Act	
S.C. Code Ann. § 15-78-10 *et seq.*	5
§ 15-78-20(a)	5, 5-6
§ 15-78-20(b)	6
§ 15-78-100	6
§ 15-78-100(a)	30
§ 15-78-110	6, 18

TABLE OF AUTHORITIES—Continued

	Page
Transportation Act of 1920, § 206(f), 41 Stat. 462	16
11 U.S.C. § 362(a)	17
15 U.S.C. § 6601(b)	17
15 U.S.C. § 6606(e)(4)	17
42 U.S.C. § 1983	14
50 U.S.C. App. § 8 (c)	16
50 U.S.C. App. § 525	16, 17
U.S. Constitution	
Amend. X	7
Art. I, § 8	9
Art. I, § 8, cl. 4.	17
Art. I, § 8, cls. 11-15	16
Art. I, § 8, cls. 12-14	17
Art. I.,§ 8, cl. 17	9
Art. III, §1	9
Other Authorities	
51 Am. Jur.2d *Limitation of Actions* (2000)	5
American Law Institute, *Study Of The Division Of Jurisdiction Between State And Federal Courts* (1969)	16, 18-19, 19
Brian A. Beckom, Note, *Pushing the Limits Of Judicial Power: Tolling State Statutes of Limitations Under* 28 U.S.C. § 1367(d), 77 Tex. L. Rev. 1049 (1999)	16
Alexander Hamilton, The Federalist No. 82 (Isaac Kramnick ed., 1987)	10, 11
H.R. Rep. No. 101-734 (1990), *reprinted at* 1990 U.S.C.C.A.N. 6860	15, 27
James Kent, *Commentaries on American Law* (1st ed. 1826) & (2d ed. 1832)	4, 10, 22, 28

TABLE OF AUTHORITIES—Continued

Page

James Madison, The Federalist No. 39 (Isaac Kramnick ed., 1987) 7, 8, 23
James Madison, The Federalist No. 45 (C. Rossiter ed., 1961) 7
Charles A. Wright, *Law of Federal Courts* (5th ed. 1994) 15

INTEREST OF THE *AMICI CURAIE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

This case implicates three core attributes of state sovereignty. The first is a State's power to create a statutory right and define the parameters for enforcement of that right. The second is a State's authority to determine whether local governments are entitled to the protections of sovereign immunity with respect to state-created causes of action. The third is a State's authority to prescribe the rules for litigation in its courts, including the power to regulate the courts' workload.

The Supremacy Clause requires state courts to hear federal causes of action within their jurisdiction and apply federal law procedures applicable to the federal statutory scheme. The statute at issue here, 28 U.S.C. § 1367(d), however, goes much further. It orders a state court to hear a state-created cause of action notwithstanding a fundamental limitation that the State has imposed on the enforcement of the right. Such preemption is not a valid exercise of Congress's Article III powers.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Article III does not grant Congress the power to override a State's limitations policy with respect to a state-created cause of action litigated in the State's courts. This Court has

---

[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

long recognized that "[t]he state courts are not, in any sense of word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.). Rather, state courts are creations of separate and independent sovereigns and derive their authority from state constitutions and state law, and not Article III.

This fundamental premise of the constitutional structure precludes any assertion by Congress of Article III power either to rewrite the substantive rules with respect to state-created causes of action or to regulate the rules of procedure in state courts. As the Court explained in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407-08 (1871), "[i]n their laws, and mode of enforcement, neither [sovereign] is responsible to the other. How their respective laws shall be . . . carried into execution; and in what tribunals . . . are matters subject to their own control, and in the regulation of which neither can interfere with the other."

2. While Congress has enacted several statutes tolling state statutes of limitations, these provisions have typically been enacted pursuant to expressly delegated Article I powers. Section 1367(d), by contrast, is an Article III enactment that petitioner justifies as analogous to a federal court's authority to issue orders as "a necessary aid to jurisdiction." Pet. Br. 21. Section 1367(d) is, however, a considerable expansion beyond the permissible scope of such an order, which the Court has explained is "something similar to the concept of injunctions to 'protect or effectuate' judgments." *See, e.g., Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970). Indeed, section 1367(d) does not even apply until a federal court dismisses the claim and declines jurisdiction. Such a dismissal is not a judgment on the merits. Section 1367(d) therefore cannot be properly viewed as a necessary aid to federal court jurisdiction.

3. Several lines of authority confirm the core proposition that Congress does not have power under Article III to override a State's limitation policy with respect to state-created causes of action. The Court's Full Faith and Credit Clause jurisprudence has long recognized "that laws limiting the time of bringing suit, constitute a part of the lex fori . . . they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial independence." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet. 457, 466 (1831). The Court has thus recognized the power of a State to control access to its courts by applying its own statutes of limitations "even when the substance of the claim must be governed by another State's law." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988).

Moreover, the *Erie* line of cases establishes limits on Article III power that preclude the application of section 1367(d) in this case. As the Court recognized in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 112 (1945), "[w]henever [a State's limitations] law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court."

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitations are an essential means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. Petitioner thus errs in asserting that notice to defendants is the only legitimate purpose of a statute of limitations and "[t]olling works no prejudice to State interests." Pet. Br. 41.

Petitioner could have easily filed a protective action in state court within the limitations period of the South Carolina Tort Claims Act. This simple step would have preserved

petitioner's state law claims and shown due respect for South Carolina's sovereign interest in controlling the litigation of state-created rights in its own courts.

Nor is there any merit to petitioner's contention that South Carolina's non-tolling policy discriminates against a federal right. Rather, the State's policy is a neutral rule, which applies whether a litigant pursues a claim in the courts of another State, a foreign country, or the United States. A state court does not violate the Supremacy Clause when it applies a forum-neutral tolling rule to a state-created right litigated in state court.

ARGUMENT

SECTION 1367(d) IS AN UNCONSTITUTIONAL ENCROACHMENT ON STATE SOVEREIGNTY

For nearly two centuries it has been established that "'[t]he period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (quoting 2 James Kent, *Commentaries on American Law* 462-63 (2d ed. 1832)). As the Court long ago explained, "the time after which suits or actions shall be barred, has been from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839).

The Court has accordingly recognized that "[s]tatutes of limitations are not simply technicalities." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Moreover, "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

These propositions carry even greater force where, as here, "a statute creates a right of action that did not exist at common law and does not exist in the absence of the statute." 51 Am. Jur. 2d *Limitation of Actions* § 280, at 629 (2000). In such circumstances, "the time limit described in such a statute is a limitation upon the right itself," and "the limitation prescribed in the statute, within which such an action must be commenced, is a condition imposed upon the exercise of the right of action granted, and is not extended by the pendency and dismissal of a former action." *Id.* at 629-30. *Cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542 (2002) ("a limitations period may be 'a central condition' of the sovereign's waiver of immunity") (quoting *United States v. Mottaz*, 476 U.S. 834, 843 (1986)).

Like all States, South Carolina has enacted a comprehensive set of statutes governing the timeliness of state-created causes of action. *See* S.C. Code Ann. §§ 15-3-20 *et seq.* Unlike some States, South Carolina has not enacted a "savings" or "renewal statute," and thus a claim brought in another sovereign's courts does not toll the State's statutes of limitations. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 431-32 & n.9 (1965); *see also generally* S.C. Code Ann. Ch. 3. This rule applies whether a suit is brought in the courts of another State, a foreign country, or the United States.

Most significantly, South Carolina has weighed the competing interests of those injured by tortious governmental conduct and "the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions." South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-20(a). It has thus exercised its sovereign authority to extend sovereign immunity to its political subdivisions such as respondent. *See* South Carolina Tort Claims Act, codified at S.C. Code Ann. § 15-78-10 *et seq.*; *see also id.* at § 15-78-20(a). As section 15-78-20(a) states, it is South Carolina's "public policy . . .

that the State, and its political subdivisions, *are only liable for torts within the limitations of this chapter and in accordance with the principles established herein*." *Id.* (emphasis added).

The intent of the Act is "to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this [statute]." *Id.* § 15-78-20(b). The statute thus "provide[s] for liability on the part of the State [and] its political subdivisions . . . only to the extent provided herein," and provides "the exclusive civil remedy . . . for any tort committed by a governmental entity, its employees, or its agents," except for a narrow category of torts not relevant here. *Id.*

The Act imposes several limitations on suits for governmental torts, the most important for present purposes being that "any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered[.]" *Id.* § 15-78-110; *see also id.* at § 15-78-100. The Act also limits the applicability of South Carolina's general tolling provisions in tort actions against governmental entities. *See id.* § 15-3-40 (tolling if plaintiff is under 18 or mentally incompetent); *see also id.* §§ 15-78-100; 15-78-110.

Petitioner seeks to override these important state policies by invoking 28 U.S.C. § 1367(d) to toll her state-created claim because she brought it first in federal court. As explained below, section 1367(d) exceeds the bounds of Article III power and thus cannot save her state-created cause of action. The judgment of the South Carolina Supreme Court should therefore be affirmed.

A. Congress Does Not Have A General Supervisory Authority Over The Tolling Rules Applicable To State-Created Causes Of Action Litigated In State Courts

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

The Constitution's preservation to the States of a core of sovereignty is manifested in several ways. It is displayed implicitly by the grant to Congress of the limited, enumerated powers found in Article I, Section 8. *See id.* at 919; *see also Gregory*, 501 U.S. at 457 (1991) ("The Constitution created a Federal Government of limited powers."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). It is made express by the text of the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (Madison) (C. Rossiter ed., 1961), *quoted in Gregory*, 501 U.S. at 458.

Where the Constitution does grant power to the federal government, that power is limited in a critical respect vis-à-vis the States. The Court observed in *New York v. United States*, 505 U.S. 144, 166 (1992), that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *See also Printz*, 521 U.S. at 919-20 ("the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people"). As the Court has explained:

> The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

Printz, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). As Madison further wrote: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245 (Madison) (Isaac Kramnick ed., 1987).

The structure of the Constitution "thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. South Carolina's enactment of its Tort Claims Act is a paradigmatic example of a State "represent[ing] and remain[ing] accountable to its own citizens," *id.*, by providing a legal remedy for tortious conduct of government employees but setting the parameters for obtaining relief.

2. Article I, Section 8, of the Constitution sets forth Congress's powers. Clause 17 confers on Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, and "to exercise like Authority over all Places purchased . . . for the Erection of" military and other installations, thus granting Congress police power over these areas. U.S. Const. Art. I, § 8, cl. 17. The Constitution otherwise "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing Art. I, § 8); *see also United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.") (internal quotations and citations omitted).

The Court has further held that Congress has implied "power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department . . . thereof." *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263 (1880). But the scope of Congress' power with respect to the federal judicial power is not unlimited. Under Article III, Congress indisputably has power to "ordain and establish" federal courts inferior to this Court. U.S. Const. Art. III, §1. This includes the power to regulate the jurisdiction of, and the procedure to be followed in, the federal courts. *See Sibbach v. Wilson*, 312 U.S. 1 (1941); *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

Article III does not, however, grant power to Congress or the federal courts either to superintend the rules of procedure in the state courts or to rewrite the substantive rules governing state-created causes of action. A long line of authority rejects the notion that state courts are inferior courts under Article III and "that Congress could confer jurisdiction on the

State courts." *Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 141 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27 (1820) (opinion of Washington, J.) ("I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States. . . ."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene and sit in judgment on [a federal criminal] offense."). *See also* 1 James Kent, *Commentaries on American Law* 377 (New York, O. Halstead 1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case.").

While a state court is required to enforce a federal cause of action where its jurisdiction is "adequate and appropriate," this obligation does not derive from a congressional conferral of jurisdiction but from the Supremacy Clause itself. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also* The Federalist No. 82, at 459 (Hamilton) (Isaac Kramnick ed., 1987). The Court has expressly rejected the contention that state courts adjudicating a federal claim "become courts of the United States, exercising a jurisdiction conferred by Congress." *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). In *Bombolis*, the Court explained that its holdings that a state court with adequate jurisdiction must enforce a federal claim "in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing the right, the state court was to be treated as a Federal court, deriving its authority not from the state creating it, but from the United States." *Id.*

The Court recognized in *Bombolis* that the state courts derive their authority from state constitutions and state law. As Chief Justice Marshall explained almost two hundred years ago: "[t]he state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt. . . . They

are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); *see also* The Federalist No. 82, at 459 (in taking cognizance of cases arising under federal statutes, state courts would exercise "the judiciary power" of their own government).

As these cases demonstrate, Congress's authority to regulate the procedure in the federal courts is derived from its powers to create inferior federal courts and regulate their jurisdiction. Moreover, state courts are creations of separate and independent sovereigns. Article III therefore does not grant Congress the power to regulate the procedure in state courts. The state and federal governments are of "distinct and independent character . . . within their respective spheres of action." *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871). "Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other." *Id.* at 406. As the Court further explained:

> In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Id. at 407-08.

Thus, in *Mondou v. New York, N.H. & Hart. Ry. Co.*, 223 U.S. 1 (1912), which preceded *Testa* in holding that state courts with adequate jurisdiction must enforce a federal cause of action, the Court was careful "to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*." *Id.* at 56 (emphasis added). The Court

further explained that the case involved "only [the] question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." *Id.* at 56-57. Moreover, in *Testa*, the Court noted the respondent's concession "that this same type of claim arising under Rhode Island law would be enforced by that State's courts" and that "[i]ts courts have enforced claims for double damages growing out of the Fair Labor Standards Act." 330 U.S. at 394.

True enough, subsequent cases establish that state courts must apply a federal procedure that is "part and parcel" of a federal cause of action. *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (internal quotation and citation omitted). Furthermore, "where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Brown v. Western R.R. Co. of Ala.*, 338 U.S. 294, 296 (1949)).

Felder recognized, however, that "[*n*]*o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.*" 487 U.S. at 138 (emphasis added). As the Court earlier declared, "the procedure by which [state-created] rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931).

Procedural rules, of course, constitute the *lex fori*. And because "they are laws for administering justice," which is "one of the most sacred and important sovereign rights and duties[,] . . . a restriction" on a State's authority to control them would "materially affect both legislative and judicial

independence." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831); *cf. M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) at 327 (noting "the now well understood rights of nations to organize their judicial tribunals according to their notions of policy"). Unless a State's sovereignty over its judicial process is no more than an empty shell, the rules of procedure which a State adopts for administering its own laws cannot be revised by Congress in an exercise of Article III power.

Consistent with this understanding, the Court has long recognized that the federal judicial power is of limited scope. In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court repudiated *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), recognizing the "fallacy underlying" its rule that federal courts "need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court" and "are free to exercise an independent judgment as to what the common law of the state is . . . ." 304 U.S. at 71, 79. *Erie*'s basis was the Constitution's limitations on federal power:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. *Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.* And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78 (emphasis added).

As the foregoing demonstrates, the Constitution does not grant Congress a general supervisory authority over the state courts in the formulation of either common law or rules of procedure. Indeed, whenever a State does not recognize

tolling based on the filing of a claim in the courts of another sovereign, it is erroneous to suggest that section 1367(d), which orders a state court to hear a claim it otherwise would not, "demonstrate[s] a due respect for both federalism and the values it represents." Pet. Br. 7.[2] And where, as here, a litigant invokes section 1367(d) to override a State's policy regarding the conditions for suing a public entity, section 1367(d) is manifestly not a valid exercise of Congressional power.

---

[2] Petitioner argues that section 1367(d) fosters federalism by encouraging federal district courts to dismiss supplemental state law claims which are more properly heard in the state courts and would be deemed untimely if re-filed in state court. *See* Pet. Br. 8-9. Petitioner further notes the various ad hoc approaches taken by federal courts in addressing the problem, such as conditioning dismissal on the defendant's waiver of a state law limitations defense or refusing to dismiss the case. *See id.* at 13-15. Petitioner argues that these solutions "were unduly complex and at odds with the principle of judicial economy, adding significant additional litigation time and effort." *Id.* at 16; *see also* U.S. Br. 22-23.

Neither petitioner nor the United States explains why petitioner could not have filed her suit in state court within the applicable limitations period after filing her federal court action and then moved the state court to stay proceedings pending resolution of her federal case. This simple and inexpensive expedient would obviate § 1367(d)'s intrusion on state sovereignty.

Such a protective action would have been particularly appropriate in this case, given the exacting standard for prevailing in a section 1983 action against a local government. When a county has a facially constitutional policy, a section 1983 plaintiff must meet the high evidentiary burden of showing either "deliberate indifference" or a "persistent and widespread practice" sufficient to support local government liability. Pet. App. 16a; *see also City of Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part and dissenting in part) ("the Court's opinion correctly requires a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy"). Prudence thus suggested that petitioner file her state and federal claims in both state and federal courts, and move to stay the state court action pending the resolution of federal court proceedings.

B. Section 1367(d) Exceeds Congress' Powers Under The Constitution

Section 1367(d) was enacted in 1990 as part of Congress's codification of the doctrines of pendant claim, pendent party, and ancillary jurisdiction into the doctrine of supplemental jurisdiction. *See* Charles A. Wright, *Law of Federal Courts* § 9, at 33-34 (5th ed. 1994). Section 1367(d) provides:

> The period of limitations for any claim asserted under [1367(a) supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Judicial Improvements Act of 1990, § 310(a), Pub. L. No. 101-650, 104 Stat. 5089, 5114 (1990) (codified at 28 U.S.C. § 1367(d)). The provision received little attention in Congress other than a cursory statement buried in a House Report that its

> purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal courts. It also eliminates a possible disincentive [sic] from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

H.R. Rep. No. 101-734, at 30 (1990), *reprinted at* 1990 U.S.C.C.A.N. 6860, 6876.

By its plain terms, section 1367(d) displaces state tolling laws and policies whenever a State does not give tolling effect to the filing of a suit in a court of another sovereign—so long, of course, as a plaintiff files first in federal court. The statute cannot be sustained as an exercise of either

Congress's express powers under Article I or its implied powers under Article III. Moreover, because the statute violates the Constitution's structural principles of federalism, it cannot be sustained under the Necessary and Proper Clause.[3]

1. Throughout the nation's history, Congress has enacted several laws tolling state statutes of limitations. *See* An Act In Relation To The Limitation Of Actions In Certain Cases, 13 Stat. 123 (1864); Transportation Act of 1920, § 206(f), 41 Stat. 462; 50 U.S.C. App. § 8(c) (Trading with the Enemy Act); 50 U.S.C. App. § 525 (Soldiers And Sailors' Civil Relief Act Of 1940). Each of these statutes, however, was enacted in response to such national emergencies as the Civil War and the First and Second World Wars. Article I explicitly grants Congress the power "[t]o declare [w]ar," "raise and support [a]rmies," "provide and maintain a [n]avy," "[t]o make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," and "[t]o provide for calling forth the [m]ilitia to execute the [l]aws of the Union, suppress [i]nsurrections and repel [i]nvasions." U.S. Const. Art. I, § 8, cls. 11-15.

As the Court observed in a challenge to the tolling provision enacted during the Civil War,

> The measures to be taken in carrying on war and to suppress insurrection are not defined. . . . [T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power . . . to remedy the evils which have arisen from its

[3] Congress apparently modeled section 1367(d) after a proposal made by the American Law Institute. *See* Brian A. Beckcom, Note, *Pushing the Limits of Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex. L. Rev. 1049, 1058 (1999); *see also* The American Law Institute, *Study Of The Division Of Jurisdiction Between State And Federal Courts* § 1386(b) (1969). The supplemental jurisdiction statute has been the subject of controversy and criticism since its adoption in 1990. *See Raygor*, 534 U.S. at 549 & n.2 (Ginsburg, J., concurring in part and concurring in the judgment).

> rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections.

Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506-07 (1871). Likewise, the tolling provision of the Soldiers and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, which remains in effect, is fully within Congress's powers to provide for the armed forces and their governance. *See* U.S. Const. Art. I, § 8, cls. 12-14.[4] The existence of these extraordinary provisions thus provides no support for the enactment of section 1367(d), which is not an exercise of any of the foregoing Article I powers.[5]

Petitioner also erroneously invokes the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362(a), to suggest that "[t]he Tenth Amendment concerns advanced by the [court below] cast constitutional doubt on the validity" of the bankruptcy statute. Pet. Br. 21. The argument is unpersuasive for two reasons. First, in forming the Union, the States expressly delegated to the Federal Government the power "[t]o establish . . . uniform [l]aws on the subject of [b]ankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4. The provision thus does not implicate Tenth Amendment concerns.

Second, South Carolina's limitations law expressly tolls any South Carolina statute of limitations "[w]hen the com-

[4] While the tolling provision of the Transportation Act of 1920 was not enacted until after the conclusion of World War I, that provision addressed the effect to be given to the Federal Government's control of the railroads during wartime and was upheld as "a war measure." *Wenatchee Produce Co. v. Great Northern Ry. Co.*, 271 F. 784, 784 (E.D. Wash. 1921).

[5] *Amici* acknowledge that the Y2K Act tolled state statutes of limitations during the statutorily prescribed pre-litigation "notice and remediation period." 15 U.S.C. § 6606(e)(4). Congress enacted the provision pursuant to the Commerce Clause. *See* 15 U.S.C. § 6601(b).

mencement of an action shall be stayed by injunction or statutory prohibition." S.C. Code Ann. § 15-3-100. Such tolling remains in effect for "the time of the continuance of the injunction or prohibition." *Id.* This provision would clearly apply to a litigant who is prohibited from filing a state law claim by operation of the bankruptcy code's automatic stay. Here, unlike in a bankruptcy proceeding, there was no injunction or statutory prohibition that prevented petitioner from filing a parallel suit in state court while her § 1983 action was pending in federal court.[6]

2. Petitioner adopts the ALI's view that section 1367(d) is a valid exercise of Congress's powers under Article III. *See* Pet. Br. 9-10; 18-29. For example, petitioner invokes the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a), contending that section 1367(d) "utilize[s] the same constitutional authority" and that "[l]ike them, § 1367(d) is a necessary aid to jurisdiction." Pet. Br. 21.

Petitioner quotes in part from the ALI's conclusory assertion (predicated on the assumption that a federal forum is invariably preferable to a state forum) that "[i]t is plainly appropriate, 'as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available.'

---

[6] Petitioner also relies on *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867), as support for the contention "that the judicial power extends to tolling the limitations period where justice would otherwise be denied." Pet. Br. 39. In *Hanger*, the Court held that the Civil War had tolled a lawsuit brought by citizens of New Hampshire against a citizen of Arkansas, a State that had joined the rebellion. *See* 73 U.S. (6 Wall.) at 534, 539-42. The *Hanger* Court specifically observed that under the law of nations there is a "[t]otal inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent. . . during war, but the restoration of peace removes the disability, and opens the doors of the courts." *Id.* at 539. In contrast, the courts of South Carolina were open to petitioner for "two years after [her] loss was or should have been discovered." S.C. Code Ann. § 15-78-110.

One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous." ALI, *Study of The Division Of Jurisdiction*, 453-54, *quoted in* Pet. Br. 10.

Section 1367(d) may be "[o]ne way" of legislating, but overriding a State's tolling policy—and especially a State's policy regarding the conditions for suing an entity endowed with sovereign immunity, which is a jurisdictional limitation—is not a constitutionally proper "aid of the [federal] judicial power." ALI Study at 455. Indeed, it is a considerable expansion beyond the traditional understanding of a federal court's authority to issue orders "necessary in aid of its jurisdiction." 28 U.S.C. § 2283 (Anti-Injunction Act); *see also* 28 U.S.C. § 1651 (All Writs Act); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) (interpreting Anti-Injunction Act).

In *Atlantic Coast Line*, the Court held that a federal court had improperly enjoined a railroad from invoking a state court injunction in a labor dispute. The Court stated that Congress's purpose in enacting the Anti-Injunction Act was to "direct[] that state courts shall remain free from interference by federal courts," 398 U.S. at 282, a purpose wholly at odds with petitioner's position. The Court held that "a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Id.* at 294. "This rule applies regardless of whether the federal court itself has jurisdiction over the controversy. . . ." *Id.*[7]

---

[7] Petitioner errs in asserting that the ruling below "raises serious issues about a federal court's authority to stay state proceedings as a matter of inherent judicial power." Pet. Br. 23. *Atlantic Coast Line* makes clear that there is no such power but only that which is granted in the Anti-Injunction Act. *See* 398 U.S. at 286-87 (rejecting argument that § 2283

The Court further observed that § 2283's exception authorizing an injunction when "necessary in aid of" a federal court's jurisdiction requires far more than showing "that the requested injunction is related to that jurisdiction." *Id.* at 295. Rather, "it implies something similar to the concept of injunctions to 'protect or effectuate' judgments." *Id.* The Court concluded that these exceptions "imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id.*

Thus, in *Atlantic Coast Line*, the Court vacated a federal district court's injunction against enforcement of a pre-existing state court injunction, rejecting, *inter alia*, the argument that the district court's injunction was "necessary in aid of" its jurisdiction and noting that "no such situation is presented here." *Id.* at 295. As the Court explained, "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Id. Cf. Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) (When a dispute is over personal liability and "does not involve the possession or control of a thing, . . . an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.").

---

only establishes a non-binding rule of comity). For all of petitioner's extensive discussion of the "unitary system of justice in the enforcement of federal interests," *see, e.g.*, Pet. Br. 33, petitioner ignores that this system clearly contemplates that state courts have authority to adjudicate federal claims and are typically free to do so. *See Atlantic Coast Line*, 398 U.S. at 294-95.

As the foregoing demonstrates, section 1367(d) is in no sense "a necessary aid to [federal] jurisdiction." Pet. Br. 21. The rule does not even apply until a federal court dismisses the claim brought under section 1367(a) and thus *declines* jurisdiction. *See* 28 U.S.C. § 1367(d). Such a dismissal is without prejudice and is not a judgment on the merits. *See* Fed. R. Civ. P. 41(a); Pet. App. 22a (Dist. Ct. Order). The tolling provision thus cannot be analogized to an injunction or order issued "to 'protect or effectuate' judgments." *Atlantic Coast Line*, 398 U.S. at 295. Indeed, the South Carolina Supreme Court's holding—which was rendered four and a half years after the federal district court dismissed petitioner's case—did not in any way interfere with the federal court's authority to decide her case. *See id.*

Moreover, contrary to the views of petitioner and the ALI, multiple lines of authority establish the core proposition that with respect to state-created causes of action, the power to "prescrib[e] the time within which suits shall be litigated in their Courts" is a fundamental and historic attribute of the States' sovereignty that Congress cannot override in an exercise of Article III power. *M'Elmoyle*, 38 U.S. (13 Pet.) at 327. These authorities are the Court's Full Faith and Credit Clause jurisprudence and the *Erie* line of cases.

3. The Court's Full Faith and Credit Clause jurisprudence has long recognized a forum State's authority to determine whether a case has been brought in a sufficiently timely fashion so as to warrant access to its courts to enforce the underlying right. In *Hawkins*, the Court observed that "[i]t is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial

independence." 30 U.S. (5 Pet.) at 466. And in *M'Elmoyle* the Court explained that:

> It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their Courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

38 U.S. (13 Pet.) at 327. The *M'Elmoyle* Court further observed that "there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits." *Id.* at 328.

Thus for nearly two centuries it has been established that "'[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" 2 J. Kent, *Commentaries on American Law* 462-63 (2d ed. 1832) (quoted in *Sun Oil Co. v. Wortman*, 486 U.S. at 726). Consistent with these principles, the Court has long recognized the power of a State to control access to its judicial forums by applying its own statutes of limitations "even when the substance of the claim must be governed by another State's law." *Sun Oil*, 486 U.S. at 723. Accordingly, under the Full Faith and Credit Clause, a forum State has the right to apply its own statute of limitations to bar an action even if the State which created the right would allow it. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953).

This rule is based on the recognition that a State's authority to control the agenda in its courts is a fundamental attribute of its sovereignty. As the *Sun Oil* Court explained: "[a] State's interest in regulating the workload of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730. And while the Full Faith and Credit Clause only addresses State to State relations, *Tarble's Case* makes clear that as between the state and Federal sovereigns, the "mode of enforcement" that either a federal or state sovereign adopts for its "distinct laws," is a "matter[] subject to [its] own control, and in the regulation of which neither can interfere with the other." 80 U.S. (13 Wall.) at 406-08.

Petitioner thus errs in contending that "[b]ecause the Constitution anticipates a unitary system of justice in the enforcement of federal interests and supplemental claims that are joined with federal ones comprise but a single 'constitutional case,' . . . it . . . follows that Congress may require state courts to hear those claims that have been divorced from the federal ones that impart original jurisdiction in the federal courts." Pet. Br. 33 (internal quotations and citation omitted). To the contrary, while state courts have a duty to apply federal law under the Supremacy Clause, Congress can neither confer jurisdiction on a state court nor rewrite its procedural rules. *See* discussion *supra* at 9-13; *see also Atlantic Coast Line*, 398 U.S. at 285-86. While the decisions of state courts on federal questions are ultimately reviewable by this Court, state courts are not "inferior courts" within the meaning of Article III. *See id.* at 295-96; *Ex parte Bollman*, 8 U.S. (4 Cranch) at 97. As the Court recently explained, state courts are courts of a co-sovereign and are "'no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Alden v. Maine*, 527 U.S. 706, 714 (1999) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed., 1961) (J. Madison)).

4. While the *Erie* line of cases has the specific purpose of determining what law must be applied when a state claim is adjudicated in federal court, it likewise manifests limits on the federal judicial power which prohibit the application of section 1367(d) to preserve petitioner's state law claims in this case. As the Court recognized in *Erie*, "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.[8]

The Court's cases applying the *Erie* rule conclusively establish that the federal courts must apply state statutes of limitations and tolling rules to a state law claim. The Court's cases likewise establish that Congress's implied powers under Article III to regulate the procedure in the federal courts do not include the intrusive power to displace state statutes of limitations and tolling rules which apply in the State's own courts.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108-09 (1945), the Court held that "if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery." 326 U.S. at 110. The Court further explained that:

> The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a

[8] The *Erie* rule that "the law to be applied in any [diversity] case is the law of the state," 304 U.S. at 78, applies as well to state claims brought in federal court under supplemental jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

> federal court and whether the remedies be sought at law or may be had in equity.

Id. at 112.

The issue of tolling is, of course, "closely related" to "the length of the limitations period." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Following *Guaranty Trust*, the Court held that *Erie* requires that a federal court apply state tolling rules to a state tort claim. *See Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34 (1949). Thus, in *Ragan*, the Court rejected the argument that the filing of a complaint in the federal district court under Fed. R. Civ. P. 3 tolled a state statute of limitations when actual service was not effected until several months following the running of the limitations period, and under state law "the requirement of service of summons within the statutory period was an integral part of [the] statute of limitations." *Id.* at 532.

The Court held that the suit was barred. While acknowledging that "the suit was properly commenced in the federal court" under the federal rules, the Court reasoned that because the "cause of action is created by local law, the measure of it is to be found only in local law . . . It accrues and comes to an end when local law so declares." *Id.* at 533.

Thirty years later the Court expressly re-affirmed *Ragan*'s holding that a federal court must apply state tolling rules in a lawsuit based on a state cause of action. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The Court rejected the argument that *Hanna v. Plumer*, 380 U.S. 460 (1965), had overturned *Ragan* and thus required that Fed. R. Civ. P. 3 be applied to displace Oklahoma's statutory requirement that actual service was required to toll the statute of limitations. *See* 446 U.S. at 749-51. The Court explained that that "[t]here is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations." *Id.* at 750-51. "In contrast," Oklahoma's statute

"is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations[,]" which "must be considered part and parcel of the statute of limitations." *Id.* at 751-52. The Court held that as there was "no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752.

Hanna held that a federal rule of civil procedure prevails in a direct conflict with relevant state law. But the federal rules of civil procedure apply only to proceedings brought "in the United States district courts." Fed. R. Civ. P. 1. *Hanna* further recognized that "*neither Congress nor the federal courts* can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution [as] in such areas state law must govern because there can be no other law." 380 U.S. at 471-72 (emphasis added).

"[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading *in those courts*," *id.* at 472, and "to prescribe housekeeping rules *for federal courts* even though some of those rules will inevitably differ from comparable state rules." *Id.* at 473 (emphasis added). *Hanna*, however, does not support the conclusion that section 1367(d) is a valid exercise of Congress's Article III powers.[9] Indeed, *Hanna* does no more than recognize the traditional principle of conflicts that the forum is entitled to apply its own rules of procedure even when the substance of a claim is governed by another sovereign's law.

---

[9] The *Hanna* analysis also applies to congressional enactments governing procedure in the federal courts. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27 (1988).

Section 1367(d) is not simply a rule of federal court procedure. While section 1367(d) tolls a state law claim during its pendency in the federal district court, its goes even further. By its plain terms it tolls a state law claim "for a period of 30 days after it is dismissed" by a federal court. It does so for the purpose of allowing plaintiffs who brought suit in federal court to refile their claims in state court notwithstanding the State's legitimate policy to not allow any case filed in another sovereign's courts to be refiled in its own courts after the expiration of the limitations period. *See* H.R. Rep. No. 101-734, at 30; 1990 U.S.C.C.A.N. at 6876. Section 1367(d) thus governs "practice and pleading in" the state courts, *Hanna*, 380 U.S. at 472, and exceeds the bounds of Congress's Article III power.

Moreover, where as here, a state statute creates a legal right that did not exist at common law and makes timely filing of a suit an essential element of the right, the limitation policy is in every sense "part and parcel" of the right itself. *Walker*, 446 U.S. at 752. Petitioner's contention that Congress has power under Article III to override South Carolina's legislative scheme for suing governmental entities in state court for money damages thus goes well beyond any bona fide regulation of the federal courts' jurisdiction and procedure. It impermissibly usurps a State's sovereign authority to create a legal right and make fundamental policy choices regarding the conditions for enforcing the right. Section 1367(d) thus manifestly does not "foster[] a greater adherence to the key values of federalism." Pet. Br. 17.

5. Petitioner further asserts that South Carolina's non-tolling policy violates the Supremacy Clause because it "will frequently and predictably produce different outcomes . . . [based] solely on whether the claim is [heard] in state or federal court." Pet. Br. 27-28 (quoting *Felder v. Casey*, 487 U.S. at 138). Petitioner's reliance on *Felder* is misplaced because section 1367(d) does not provide a "federal remedy."

Id. at 28. At most it provides a procedural right which must give way to a State's legislative and judicial determinations for litigating state law claims in the State's courts.

As recognized above, the Supremacy Clause requires a state court to hear a federal claim when it has "adequate and appropriate" jurisdiction over an analogous state claim. *See Testa*, 330 U.S. at 394. And a state court adjudicating a federal claim is required to apply federal procedures that are part of the federal scheme. *See Felder*, 487 U.S. at 153. But the *Felder* Court also recognized that "[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. at 138. *See also Hardware Dealers*, 284 U.S. at 158 ("the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control"). South Carolina's non-tolling policy does not violate the *Testa* rule because the State itself is the source of the right.

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitations are one of the primary means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. *See Sun Oil,* 486 U.S. at 730. State-created rights could become illusory if the State's courts are clogged with stale claims, thus preventing the expeditious rendering of justice. *See Sun Oil*, 486 U.S. at 726 (quoting *Kent's Commentaries*, at 462-63) ("'The period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'")

Petitioner ignores that the States' use of statutes of limitation to set the agenda for their own courts is both a historic and fundamental attribute of their sovereignty. She instead relies on several cases involving federal statutory rights to contend that notice to defendants is the only legitimate purpose of a statute of limitations, *see* Pet. Br. 36-40, and that "[t]olling works no prejudice to State interests." *Id.* at 41. Petitioners authorities are, however, inapposite.

Contrary to petitioner's assertion, *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944), does not present "a strikingly similar fact pattern" to this case. Pet. Br. 36. Rather, *Telegraphers* involved a federal court action to enforce a federal statutory right. *See* 321 U.S. at 347-48. In *Telegraphers*, the Court held that a state statute of limitations relied upon by the employer was inapplicable, that the federal claim was governed by a two-year federal statute of limitations, and that the federal court action had been commenced with that two-year period. *Id.* at 348-49. Just as "[i]t is difficult to see how state statutes of limitations can restrict the power of the federal administrative tribunal to consider and adjust claims," *id.* at 348, it is equally difficult to see how Congress can order a state court to hear a state law claim which its own legislature has prohibited it from adjudicating.

Burnett likewise is readily distinguishable. That case, too, involved a federal cause of action (the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*), which contains a specific statute of limitations, 45 U.S.C. § 56, but is silent as to tolling. *See* 380 U.S. at 424-25. As the Court explained, "[t]he basic question" of whether "a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'" *Id.* at 426 (quoting *Midstate Horticultural Co. v. Pennsylvania R.R. Co.*, 320 U.S. 356, 360 (1943)).

Although the *Burnett* Court held that filing a state court action had tolled the limitations period, it did so to effectuate Congress's intent that FELA have "a uniform operation." *Id.* at 433 (citation and internal quotation omitted). The case thus does not support petitioner's broad assertion "that the judicial power extends to tolling the limitations period where justice would otherwise be denied." Pet. Br. 39. While it is

this Court's role to interpret federal law and determine the purposes of the limitations period of a federal cause of action, it is likewise the South Carolina Supreme Court's role to interpret South Carolina law and determine whether tolling is consistent with its legislature's intent in creating a cause of action.

6. Petitioner further argues that the holding below discriminates against a federal right. *See* Pet. Br. 41-47. Petitioner asserts that the South Carolina "limitations period . . . penalizes her with forfeiture of her state law claims for having pursued them in federal court." *Id.* at 42. Petitioner further contends that the "[r]emoving the tolling provision from the statute results in a denial of due process by preventing the plaintiff from ever making her case before a court," *id.* at 43, and that South Carolina cannot enforce its limitations policy because it discriminates against her federal right. *See id.* at 44 (citing *Testa* and *Dice*).

Petitioner, however, can make no showing that South Carolina's non-tolling policy singles out for discriminatory treatment those litigants who file in federal court. Rather, the State's policy is a neutral rule, which applies whether a litigant pursues a claim in the courts of another State, a foreign country, or the United States. Moreover, petitioner could have filed a protective action in state court at any time prior to the expiration of the applicable two-year statute of limitations. *See* S.C. Code Ann. § 15-78-100(a). Thus, to the extent *Testa*'s non-discrimination principle applies to a state court litigant who previously sought redress in a federal forum, petitioner has not established that South Carolina's courts have discriminated against her because she exercised a federal right.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

January 15, 2003

* Counsel of Record for the *Amici Curiae*

FILED

JAN 15 2003

OFFICE OF THE CLERK

No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY, SOUTH CAROLINA

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE STATES OF ALABAMA, COLORADO, DELAWARE, GEORGIA, HAWAII, INDIANA, IOWA, KANSAS, MISSISSIPPI, MISSOURI, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM H. PRYOR, JR.
ATTORNEY GENERAL
NATHAN A. FORRESTER
SOLICITOR GENERAL
STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

CARTER G. PHILLIPS
GENE C. SCHAERR*
SUSAN A. WEBER
DEREK E. BROWN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

*Counsel of Record

[Additional Counsel Listed on Inside Cover and Front Pages]

January 15, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

KEN SALAZAR
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
7th Floor
Denver, CO 80203
(303) 866-3557

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

THURBERT E. BAKER
ATTORNEY GENERAL
STATE OF GEORGIA
40 Capitol Sq. SW
Atlanta, GA 30334
(404) 656-4585

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1282

STEVE CARTER
ATTORNEY GENERAL
STATE OF INDIANA
Indiana Govt. Center
S. 402 W. Washington St.
5th Floor
Indianapolis, IN 46204
(317)-232-6201

THOMAS J. MILLER
ATTORNEY GENERAL
STATE OF IOWA
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, IA 50319
(515) 281-3053

CARLA J. STOVALL
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Ave.
2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205
(601) 359-3824

JEREMIAH W. ("JAY") NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
207 West High Street
Jefferson City, MO 65102
(573) 751-3321

DAVID SAMSON
ATTORNEY GENERAL
STATE OF NEW JERSEY
R. J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625
(609) 292-4925

WAYNE STENEHJEM
ATTORNEY GENERAL
STATE OF NORTH DAKOTA
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

CHARLIE CONDON
ATTORNEY GENERAL
STATE OF SOUTH CAROLINA
Rember C. Dennis Office Bldg.
P.O. Box 11549
Columbia, SC 29211-1549

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-2868

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF VIRGINIA
900 East Main Street
Richmond, VA 23219
(804) 786-2071

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 N. Lincoln Blvd.
Ste. 112
Oklahoma City, OK 73105
(405) 521-3921

PAUL G. SUMMERS
ATTORNEY GENERAL AND REPORTER
STATE OF TENNESSEE
P.O. Box 2027
Nashville, TN 37202
(615) 741-5860

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d), the tolling provision of the federal supplemental jurisdiction statute, should be construed to toll the statute of limitations on State-law claims in State courts against a political subdivision of a State.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. UNDER THE CONSTITUTIONAL DOUBTS DOCTRINE APPLIED IN *RAYGOR*, SECTION 1367(d) SHOULD NOT BE CONSTRUED TO EXTEND TO SUITS BROUGHT AGAINST POLITICAL SUBDIVISIONS OF STATES	6
A. Application Of Section 1367(d) To Any Defendant Raises, At A Minimum, Significant Constitutional Doubt	8
B. There Is Ample Support For The Narrower Conclusion Of The Court Below That Extending Section 1367(d) To Political Subdivisions Of Non-Consenting States Exceeds Congress's Powers Under Articles I And III	19
II. PETITIONER'S INTERPRETATION SHOULD BE REJECTED FOR THE SEPARATE REASON THAT SECTION 1367(d) DOES NOT CONTAIN A CLEAR STATEMENT OF CONGRESSIONAL INTENT TO REACH CLAIMS AGAINST THE STATES' POLITICAL SUBDIVISIONS	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Alden v. *Maine*, 527 U.S. 706 (1999) ..... *passim*
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 7
Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985) 28
BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994) 27, 28
Board of Regents v. *Tomanio*, 446 U.S. 478 (1980) 1, 9
Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 9
Buckman Co. v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) 17
Bush v. *Gore*, 531 U.S. 98 (2000) 13
Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 28
City of Columbus v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226 (2002) 2, 20, 21
Cleveland v. *United States*, 531 U.S. 12 (2000) 27
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 13
Federal Mar. Comm'n v. *South Carolina State Ports Auth.*, 122 S. Ct. 1864 (2002) 11
Felder v. *Casey*, 487 U.S. 131 (1988) 9
FERC v. *Mississippi*, 456 U.S. 742 (1982) 18
Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 17
Gray-Hopkins v. *Prince George's County, Md.*, 309 F.3d 224 (4th Cir. 2002) 21
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 28
Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) 13
Harris v. *United States*, 122 S. Ct. 2406 (2002) 7
INS v. *St. Cyr*, 533 U.S. 289 (2001) 7
Marx v. *Government of Guam*, 866 F.2d 294 (9th Cir. 1989) 20

TABLE OF AUTHORITIES—continued

Page

M'Elmoyle v. *Cohen*, 38 U.S. (13 Pet.) 312 (1839) 1, 9
McMillian v. *Monroe County, Ala.*, 520 U.S. 781 (1997) 21
Monell v. *Department of Soc. Servs.*, 436 U.S. 658 (1978) 14
New York v. *United States*, 505 U.S. 144 (1992) 4, 7, 11, 27
Printz v. *United States*, 521 U.S. 898 (1997) 4, 11, 16, 18, 23
Ragan v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) 13
Raygor v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002) ..... *passim*
Rummel v. *Estelle*, 445 U.S. 263 (1980) 13
Rust v. *Sullivan*, 500 U.S. 173 (1991) 7
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 23
Solid Waste Agency v. *U.S. Army Corps of Eng'rs*, 531 U.S 159 (2001) 28
State v. *Hogg*, 535 A.2d 923 (Md. 1988) 21
Stenberg v. *Carhart*, 530 U.S. 914 (2000) 6
Stewart v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870) 10, 13
Sun Oil Co. v. *Wortman*, 486 U.S. 717 (1988) 9, 20
Testa v. *Katt*, 330 U.S. 386 (1947) 18
The Mayor v. *Cooper*, 73 U.S. (6 Wal.) 247 (1867) 7
Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980) 13
Wilson v. *Garcia*, 471 U.S. 261 (1985) 13

CONSTITUTIONS AND STATUTES

U.S. Const. art. I, § 8 ..... 12, 20
art. III, § 1 12
art. IV, § 3, cl. 2 20

TABLE OF AUTHORITIES—continued

	Page
Haw. Const. art. VIII, § 1	20
S.C. Const. art. VIII, § 1	20
28 U.S.C. § 1367(d)	1
42 U.S.C. § 1983	2
50 U.S.C. app. § 525	13
735 Ill. Comp. Stat. Ann. 5/2-601	16
S.C. Code Ann. § 15-78-100(a)	22

COURT RULES

Miss. R. Civ. P. 20	15
N.Y. C.P.L.R § 3101(d)	15
N.Y. C.P.L.R § 3214	16

SCHOLARLY AUTHORITIES

American Law Inst., *Study of the Divison of Jurisdiction Between State and Federal Courts* (1969)	11
Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* (3d ed. 1988)	17
S. Beer, *To Make a Nation: The Rediscovery of American Federalism* (1993)	21
Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947 (2001)	19

STATEMENT OF INTEREST

The interest of the *Amici* States in this case is similar, and in some respects identical, to their interest in *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002). There, this Court held that the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), should not be read to toll State statutes of limitations on claims against non-consenting States filed in federal court but later dismissed on Eleventh Amendment grounds. Here, as in *Raygor*, the *Amici* States have a strong, general interest in controlling the timing rules applicable to State-law claims litigated in State courts. And the *Amici* States have a particularly vital interest in controlling the application of those rules to claims against State-created entities, whether it be a State university (as in *Raygor*) or, as here, one of the State's own political subdivisions.

As this Court has repeatedly recognized, statutes of limitations and related tolling rules "are not simply technicalities," but are "fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). Accordingly, as this Court put it more than 160 years ago, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle* v. *Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839).

As the court below recognized, a State's sovereign interest in these timing rules is heightened considerably where, as here, the defendant is a State-created entity such as a political subdivision. In that context, the timing rules are an important element of a State's decision regarding the extent to which State entities will be entitled to sovereign immunity under State law. The ability to control the waiver of a State entity's

sovereign immunity is an important attribute of State sovereignty, just as the ability of the United States to control the sovereign immunity of its own political subdivisions and other federal entities is an important aspect of the United States' sovereignty. Indeed, as this Court recently explained, just as federal territories are subject to plenary control by the United States government, so also "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2232 (2002) (citing *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607-08 (1991)).

As interpreted by petitioner, and by the United States as intervenor, Section 1367(d) would impinge significantly upon both of these sovereign interests—the ability to set the timing rules on the litigation of State-law claims in State courts and the ability to control a political subdivision's entitlement to sovereign immunity under State law. Accordingly, as they did in *Raygor*, *Amici* have a powerful interest in ensuring that Section 1367(d) is not interpreted expansively in this case.

STATEMENT OF FACTS

The essential facts are as follows. The claims at issue in this case arise out of the death of Carl Jinks on October 18, 1994. Petitioner, his estate, commenced an action in federal district court against Richland County, South Carolina, alleging federal constitutional claims under 42 U.S.C. § 1983, as well as supplementary state law claims under the South Carolina Tort Claims Act. The district court ruled in favor of the county on the Section 1983 action, and dismissed the state claims without prejudice. Plaintiff then filed this action in the State Court of Common Pleas for Richland County on December 18, 1997.

However, the statute of limitations for the state action expired on October 18, 1996, fourteen months prior to the

date the action was filed in State court. The South Carolina Supreme Court unanimously ruled that if Section 1367 were construed to have tolled the statute of limitations during that fourteen-month period, it would violate South Carolina's sovereignty by effectively altering the terms on which the State had agreed to waive the sovereign immunity of its political subdivisions, including respondent Richland County. Finding that nothing in the Constitution—including the Necessary and Proper Clause and Congress's authority in Articles I and III to ordain and regulate the lower federal courts—expressly or by necessary implication authorized such an intrusion upon State sovereignty, the court ruled that Section 1367(d), as so construed, was beyond Congress's power and therefore violated the Tenth Amendment.

SUMMARY OF ARGUMENT

In *Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533 (2002), this Court faced an issue virtually identical to the issue presented here. There, the State defendants argued that, under this Court's Eleventh Amendment cases, 28 U.S.C. § 1367(d) was unconstitutional as applied to arms of non-consenting States. But rather than decide that issue, the Court determined that Section 1367(d) did not need to be construed so broadly. And, because of the constitutional doubt and reallocation of federal-state power such a construction would create, the Court construed that provision as not applying to arms of non-consenting States.

Here too, a State-created defendant argues, and the South Carolina Supreme Court held, that under this Court's Tenth Amendment decisions, Section 1367(d) is unconstitutional as applied to political subdivisions of non-consenting States. And here too, although the argument for unconstitutionality is compelling, the Court can and should avoid the constitutional issue by declining to read the provision as extending to claims against the States' political subdivisions.

The interpretation advanced by petitioner would invade the States' traditional sovereignty in at least two significant ways. First, as a general matter, it would invade the States' sovereign prerogative to regulate the litigation of State-law claims in State courts. Second, as applied here, it would intrude upon the States' prerogative to determine the conditions under which its political subdivisions will be subject to suit under State law, in the State's own courts.

Because State sovereignty is presumed in the structure of the Constitution, such an intrusion upon the States' prerogatives can be effected, if at all, only pursuant to an enumerated power. Yet the argument (advanced by the United States as well as petitioner) that this power is implicit in Congress's power under Articles I and III to ordain and establish lower federal courts cannot withstand analysis. That power obviously gives Congress the authority to regulate procedures in federal courts and, indeed, to set time limits for claims under federal law. But that authority cannot reasonably be thought to empower Congress to regulate litigation of State-law claims in *State* court, any more than Congress's authority to establish and regulate certain Executive-branch offices can be thought to empower Congress to regulate the conduct of State executive officers. Cf. *Printz* v. *United States*, 521 U.S. 898, 934 (1997). To sustain Section 1367(d) on that theory would be to give Congress the ability to transform the States' own subdivisions into "mere subdivisions" of the United States. Cf. *New York* v. *United States*, 505 U.S. 144, 166 (1992).

At a minimum, as in *Raygor*, petitioner's interpretation of Section 1367(d) would alter the traditional federal-state balance in regulating litigation against a State's political subdivisions, without the requisite clear statement necessary for such an alteration. As both the majority and the concurrence in that case emphasized, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention

to do so unmistakably clear in the language of the statute." 534 U.S. at 543 (internal quotations marks omitted) (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). Because Section 1367(d) is conspicuously devoid of any such clear intent, petitioner's interpretation of that provision cannot be squared with *Raygor* and must be rejected.

Amici thus urge the Court to do here what it did in *Raygor*: construe Section 1367(d) as excluding claims against this defendant and similarly situated State-created entities, and allow Congress to determine whether it is really necessary to decide the constitutional issues posed by petitioner's interpretation.

ARGUMENT

The fundamental flaw in petitioner's presentation is that it ignores this Court's earlier analysis, in *Raygor*, of the very statute at issue here. Petitioner's failure even to cite *Raygor*, much less discuss it, is especially surprising given that the petition for certiorari relied heavily on that decision.[1] What is even more surprising is that both the petitioner and the Solicitor General fail to mention the doctrine of statutory interpretation that the Solicitor General pressed there, and on

---

[1] Petitioner's Petition for Certiorari commenced as follows:

> In *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 122 S. Ct. 999 (2002), this Court held that the tolling provision, 28 U.S.C. § 1367(d), that is part of the federal supplemental jurisdiction statute, cannot constitutionally apply to claims filed in federal court against non-consenting States. In the course of that decision, this Court indicated that there might be some "serious constitutional doubt" as to whether the tolling provision impermissibly abrogates state sovereignty "when a State consents to suit or a defendant is not a State." This case raises that unanswered question.

Pet. for Cert. at 2 (citation omitted).

which both the majority and the concurrence in *Raygor* relied in refusing to interpret Section 1367 to extend to non-consenting States: the doctrine of constitutional doubt.

To be sure, the decision of the South Carolina Supreme Court did not rely upon this doctrine, perhaps because it did not believe it would be appropriate for a State court to adopt a narrowing construction of a federal statute. Cf., *e.g.*, *Stenberg* v. *Carhart*, 530 U.S. 914, 944 (2000) (holding that the Court is "'without power to adopt a narrowing construction of a state statute'"). Instead, that court held that the extension of Section 1367(d) to subdivisions of a State would exceed Congress's powers under Article III and thus run afoul of the Tenth Amendment.

Although *Amici* agree with this ruling, this Court need not go that far. It is sufficient to conclude, as this Court did in *Raygor*, that petitioner's interpretation of Section 1367(d) would create a legitimate doubt as to the provision's constitutionality. Alternatively, it is sufficient to conclude, as *Raygor* also did in the context presented there, that petitioner's interpretation of Section 1367(d) would at least alter the traditional federal-state balance in regulating litigation against a State's political subdivisions, and that Section 1367(d) does not contain the requisite clear statement of an intention to alter that balance. By either rationale, Section 1367(d) should not be interpreted to preempt State statutes of limitations when invoked by political subdivisions of the State against State-law claims in State court.

I. UNDER THE CONSTITUTIONAL DOUBTS DOCTRINE APPLIED IN *RAYGOR*, SECTION 1367(d) SHOULD NOT BE CONSTRUED TO EXTEND TO SUITS BROUGHT AGAINST POLITICAL SUBDIVISIONS OF STATES.

For well over a century, this Court has made clear that if "'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and

by the other of which such questions are avoided, our duty is to adopt the latter.'" *Harris* v. *United States*, 122 S. Ct. 2406, 2413 (2002) (citing *United States ex rel. Attorney Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)); see also *The Mayor* v. *Cooper*, 73 U.S. (6 Wal.) 247, 251 (1867) ("Every doubt is to be resolved in favor of the constitutionality of the law.") This longstanding doctrine is based upon the Court's "respect for Congress, which [it] assume[s] legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991). This respect requires that where "an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation omitted.) *Accord New York* v. *United States*, 505 U.S. at 170 ("'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'") (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237-38 (1998) ("'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'") (quoting *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

Although *Raygor* did not squarely resolve the issue presented here—the extent to which Section 1367 should be interpreted to apply to State-created entities other than States themselves—the Court did note that this posed a serious constitutional issue. See 534 U.S. at 547 ("We express no view on the application or constitutionality of § 1367(d) . . . when a defendant is not a State."). Moreover, one of the holdings of *Raygor* was that it is "fairly possible" to read that

statute as *not* extending to non-consenting States. It necessarily follows that it is likewise "fairly possible" to read the statute as not extending to the States' political subdivisions.[2]

Nor can there be any serious question that petitioner's interpretation of this provision would create substantial constitutional doubts. As shown below, petitioner's interpretation would invade the States' traditional prerogatives in at least two significant ways, without the requisite constitutional basis. First, application of Section 1367(d) to any defendant invades the States' prerogative to fix the limitations periods for State-law claims litigated in State courts. Second, as the court below held, application of that provision to the political subdivision of a non-consenting State intrudes upon the States' prerogative to determine the conditions under which its political subdivisions will be subject to suit and possible liability under State law, in the State's own courts.

A. Application Of Section 1367(d) To Any Defendant Raises, At A Minimum, Significant Constitutional Doubt.

By its terms, Section 1367(d) intrudes upon the traditional powers of State legislatures and courts to fix the limitations periods—including tolling rules—for State-law claims filed in State courts. As far as *Amici* have been able to ascertain, an encroachment this direct upon State authority to regulate activity in State courts is without precedent in the history of this nation.

---

[2] Specifically, this Court held that the general grant of jurisdiction in Section 1367(a), and the phrase "any claim" in Section 1367(d), do not necessarily encompass claims against an "arm" of a non-consenting State. *Raygor*, 534 U.S. at 541-42. *A fortiori*, the statute need not be read to encompass a claim against a political subdivision of a non-consenting State.

1. There can be no doubt that, except where constrained by the federal Constitution, the litigation of State claims in State courts is a matter of State rather than federal authority. As Chief Justice Marshall observed, the State courts are not "inferior" to federal courts "because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807). Thus, as this Court put it recently in *Felder* v. *Casey*, no one can dispute "the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. 131, 138 (1988).

As this Court has long recognized, moreover, statutes of limitations, and related tolling rules, "are not simply technicalities," but are "fundamental to a well-ordered judicial system." *Tomanio*, 446 U.S. at 487. Accordingly, as this Court put it in *M'Elmoyle*, 38 U.S. (13 Pet.) at 327, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." Put another way, "'[t]he period sufficient to constitute a bar to the litigation of [stale] demands, is a question . . . which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726 (1988) (second alteration in original). In short, the ability to set rules relating to the timeliness of State-law claims brought in a State's own courts is a fundamental attribute of State sovereignty.

As the United States concedes (U.S. Br. at 26-27), Section 1367(d) intrudes directly upon that sovereign power. By its terms, it displaces State tolling rules whenever a State does not give tolling effect to the filing of a suit in federal court. *Id.* at 27. In so doing, it "interferes with [the] state policy choices" underlying those rules. *Id.* Moreover, by forcing State courts to entertain suits that would otherwise be barred

by the State's own rules, Section 1367(d) imposes obligations and costs on States that the States would otherwise prefer not to bear.

It is also significant that Section 1367(d) is, as far as *Amici* are aware, unique among all the provisions of the U.S. Code dealing with court rules and procedures. No other federal statute of which we are aware has ever purported to regulate procedural rules applicable to State-law claims litigated in State courts during peacetime. The examples of such statutes cited by petitioner and the United States in their briefs, in particular the civil war statute at issue in *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870), all concerned congressional acts passed during wartime to deal with wartime exigencies, and pursuant to Congress's express war powers. No such necessity exists to justify Section 1367(d). Accordingly, Section 1367(d) is a stark departure from past congressional practice and from the respect that Congress has traditionally accorded to the authority of the States to regulate procedures applicable to State-law claims litigated in State courts.

2. *Amici* do not mean to say that Section 1367(d) lacks any policy justification. It may well, as petitioner and the United States argue, promote judicial efficiency in the sense of minimizing the sum of costs expended on the same claim in both the federal and State courts. See Pet. Br. at 16; U.S. Br. at 20-25. Indeed, if federal and State courts were creatures of the same sovereign, that sovereign might rationally decide, in the interests of *overall* efficiency, that the State courts must suffer some increase in costs and burdens in order to reduce the overall costs and burdens imposed on both systems. And such a sovereign might well decide, as the American Law Institute did in proposing Section 1367(d), and as the United States phrases it in its brief, that Section

1367(d) strikes a sensible "balance" between the "interests" of the States and the federal courts. See U.S. Br. at 21-25.[3]

However, previous decisions by this Court make clear that Congress is not entitled to treat the States or their instrumentalities as mere parts of a single, unitary sovereign. See, *e.g.*, *New York* v. *United States*, 505 U.S. at 166 ("even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts"); *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty"); *Printz*, 521 U.S. at 928 ("It is an essential attribute of the State's retained sovereignty that they remain independent and autonomous within their proper sphere of authority"). As this Court put it just last Term, "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Federal Mar. Comm'n* v. *South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1870 (2002) (citing *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991)). Accordingly, the States remain sovereigns in their own right. And Congress—even when acting at the behest of a respected organization such as the ALI—may impose such burdens on them only if some provision of the Constitution "explicitly or

---

[3] The American Law Institute's study recommended that a tolling provision be adopted for all claims originally filed in federal court but later dismissed and refiled in state court. It urged such a provision "as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available." American Law Inst., *Study of the Division of Jurisdiction Between State and Federal Courts* ix (1969) (quoting Chief Justice Earl Warren, Opening Address at the 36th Annual Meeting of the American Law Institute (May 1959)).

by necessary implication" authorizes Congress to impinge upon State sovereignty. See, *e.g.*, *Alden*, 527 U.S. at 739 (The federal government "'can claim no powers which are not granted to it by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.'").

3. No constitutional provision authorizes such action here. The sole constitutional authority pressed with any vigor by the United States is "Congress's general constitutional authority to prescribe the jurisdiction of the federal courts" under Articles I and III, coupled with the Necessary and Proper Clause of Article I. U.S. Br. at 25-26, 30. But nothing in those provisions—which authorize Congress "[t]o constitute Tribunals inferior to the supreme Court" (U.S. Const. art. I, § 8, cl. 9) and, equivalently to "ordain and establish . . . inferior Courts" (*id.* art. III, § 1)—expressly or by necessary implication authorizes Congress to override the States' sovereign authority to regulate their *own* courts, especially when applying the States' own laws.

In this regard, the inferior courts provisions are not like Section 5 of the 14th Amendment, or even the Commerce Clause, both of which permit Congressional intrusion upon certain aspects of State sovereignty when that intrusion is incident to Congress's exercise of its power to regulate subject matter enumerated in Article I or some other provision of the Constitution. The "inferior courts" provisions authorize Congress to create and regulate federal courts, but they say nothing about whether Congress may regulate the activity of State courts.

Moreover, given that State sovereignty is presumed in the structure of the Constitution, it would be most unnatural to read the provisions authorizing Congress to "ordain," "establish," and "constitute" the federal courts to do the same with respect to State courts. Indeed, interpreting the "inferior courts" provisions of Articles I and III to authorize Congress to intrude upon the management of State courts, particularly

the litigation of State claims in State courts, would be contrary to the whole theory underlying the creation of a separate federal judiciary. One of the purposes of that feature of the national government was to avoid commandeering the judiciaries of the States into federal service except, for example, where necessary to meet the exigencies of war. See, *e.g.*, *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493 (1870) (discussing Stay Act of June 11, 1864, ch. 118, 13 Stat. 123 (1864)); 50 U.S.C. app. § 525 (The Soldiers' and Sailors' Relief Act of 1940).

Inferring an authority to override State sovereignty solely from the "inferior courts" provisions of Articles I and III is all the more doubtful in light of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), and its progeny. Among other things, those decisions hold that federal courts are constitutionally bound to "defer to the decisions of state courts on issues of state law," such as State limitations periods and other timing rules. *Bush* v. *Gore*, 531 U.S. 98, 112 (2000). See *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 112 (1945); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980); *Wilson* v. *Garcia*, 471 U.S. 261, 269 & n.17 (1985) ("[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling"). Indeed, as the Court explained in *Ragan*, "[w]e cannot give the [claim] longer life in federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. at 533-34.

The practice of deferring to State judgments on such matters "reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns." *Bush*, 531 U.S. at 112. It also reflects the fact that "the Constitution 'recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments.'" *Rummel* v. *Estelle*, 445 U.S. 263, 303 (1980) (Powell, J.,

dissenting) (citing *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938)).

If Congress cannot constitutionally prescribe or alter limitations periods for State-law claims being litigated in *federal* court, *a fortiori* it cannot constitutionally regulate the limitations periods applicable to State-law claims litigated in *State* court.[4]

Nor can Section 1367(d)'s intrusion into State sovereignty be justified under the Necessary and Proper Clause, notwithstanding the United States' contention that Section 1367(d) "promotes the proper exercise of federal jurisdiction," and "furthers the effective operation of the

---

[4] The United States also suggests, in passing, that Section 1367(d) might be justified under Congress's authority "to provide a cause of action to redress constitutional violations committed by persons acting under color of state law" (U.S. Br. at 30) because, absent that provision, "plaintiffs who file Section 1983 actions in federal court" might otherwise be "deprived of avenues of redress otherwise available to them under state law." *Id.* at 30 n.7. But, in the circumstances presented here, that suggestion does not withstand even the most cursory analysis. A plaintiff concerned about maintaining a State-law claim arising out of the same conduct as that challenged in a Section 1983 action can simply file such a claim in state court and ask that it be stayed pending the outcome of his federal action. Thus, Section 1367(d) is not even "necessary," much less "proper," under Congress's authority to redress constitutional violations under Section 5 of the 14th Amendment.

Moreover, nothing in Section 5 implies an authority to override the States' sovereign interests in regulating their political subdivisions' amenability to suit, and to potential liability, in *State* court under *State* law. Section 1367(d), as interpreted by petitioner and the United States, is thus a far cry from federal-law suits against political subdivisions, which this Court has assumed to be within Congress's power under Section 5. *See, e.g. Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.").

overall scheme" established by 28 U.S.C. § 1367(a) and (c). U.S. Br. 25-26. That theory would allow virtually limitless intrusions by Congress upon the States' authority to regulate litigation in their own courts under their own laws. While the Necessary and Proper Clause is necessarily broad and flexible, it cannot be construed so broadly that it permits Congress to take any action, however invasive of State prerogatives, that makes it marginally easier or more convenient for a federal litigant to bring a pendent State claim in federal court. Otherwise the Necessary and Proper Clause would swallow the Tenth Amendment.

Indeed, if Congress can regulate State tolling rules under the guise of overall judicial efficiency, why can it not also regulate other aspects of State-court litigation? For example, would Congress not have a general power, under the Government's theory, to *require* that State courts stay any lawsuit raising issues similar to those under consideration by a federal district court, so as to avoid "duplicative" decision-making? Indeed, would it also not have the power to bar State courts from awarding relief—such as punitive damages or damages for pain and suffering—that for some reason is not as readily available in federal court, so as to avoid giving plaintiffs an "artificial" disincentive to file their claims in federal court?[5] Conversely, would it not have the power to force State courts to adopt rules that are as friendly to plaintiffs as the rules available in federal court, so as to avoid

---

[5] Many States have rules that are generally considered more friendly to plaintiffs than corresponding rules in federal court. Mississippi, for example, allows plaintiffs to join together in a single suit more easily than they can in federal court. *See* Miss. R. Civ. P. 20. New York allows no pre-trial discovery of parties' expert witnesses, which makes it more difficult for a defendant to develop a defense to a plaintiff's expert's theories. *See* N.Y. C.P.L.R § 3101(d). All else being equal, such rules would of course encourage a plaintiff to file suit in State rather than federal court.

giving plaintiffs an artificial incentive to bring their actions in federal rather than State court?[6] And would it not, indeed, have the power to promulgate, say, a nationwide body of evidence law, applicable in State as well as federal courts, on the theory that this would reduce overall litigation costs?

The United States acknowledges that Section 1367(d) impinges upon State authority "to a degree," U.S. Br. 27, but then proclaims, as it did in *Printz*, that the Supremacy Clause sweeps aside any constitutional concerns about interference with State prerogatives, *id.* at 27-28. However, as in *Printz*, reliance on "the Supremacy Clause merely brings us back to the question discussed earlier," that is, whether the law at issue here "violate[s] state sovereignty and [is] thus not in accord with the Constitution." 521 U.S. at 924-25. Or, as the Court put it in *Alden*, "[a]ppeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." 527 U.S. at 731.

Obviously, if Congress acted validly and pursuant to one of its enumerated powers in enacting Section 1367(d), the Supremacy Clause would make that provision binding upon the States, even if it displaced the States' policy choices. But that is not the issue here. The issue is whether, in enacting Section 1367(d), Congress validly acted pursuant to an enumerated power. If it is uncertain whether Congress had the power to enact Section 1367(d)—and the analysis above

---

[6] Many States likewise have rules that are generally considered more friendly to defendants than corresponding rules in federal court. For instance, Illinois still requires "fact" pleading rather than "notice" pleading, thereby making it somewhat more difficult to develop a complaint for filing in State court than in federal court. *See* 735 Ill. Comp. Stat. Ann. 5/2-601. New York allows a defendant to receive an automatic stay of trial-court proceedings by appealing the denial of a summary judgment motion. *See* N.Y. C.P.L.R. § 3214. All else being equal, such rules would tend to encourage plaintiffs to file their cases in federal court rather than State court.

establishes that, at very least—then Section 1367(d) raises constitutional doubt.

In short, the theories advanced by petitioner and the United States would seem to give Congress virtually limitless power to regulate practice and procedure in State courts, based on the direct or indirect effects those procedures might have on litigation in federal courts. It is doubtful that those who wrote the Constitution envisioned so sweeping and intrusive a power when they gave Congress the authority to "ordain and establish" inferior federal courts. Under well-established precedent, Section 1367(d) should be construed to ameliorate that doubt.

4. Even if one could infer from the inferior courts provisions of Articles I and III a Congressional power to interfere with State-court litigation of State-law claims, Section 1367(d) is, at least arguably, too great an intrusion upon State sovereignty to be considered "proper" under the Necessary and Proper Clause. Many federal laws regulate State-court litigation indirectly by, for example, providing a *federal* defense to certain State-law claims. See, *e.g. Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000) (preempting certain defect claims against automobile manufacturers); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (preempting certain claims against pharmaceutical manufacturers based on their dealings with the federal Food and Drug Administration). And a few federal rules regulate the litigation of *federal* claims and defenses in State courts. *E.g.*, Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and The Federal System* 637 (3d ed. 1988).

However, as noted above, no other federal law of which we are aware purports to regulate directly the litigation of purely *State-law* claims in State court. And the absence of any federal-law claim or defense in that situation makes it far more intrusive upon State sovereignty than a law that regulates the litigation of federal claims or provides (pursuant

to a separate constitutional grant of authority) a federal defense to a State cause of action. Cf., *e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 390-91 (1947) (holding that Congress may provide for the adjudication of federal claims in state court); *FERC* v. *Mississippi*, 456 U.S. 742, 770 (1982) (requiring state administrative agencies to apply federal law while acting in a judicial capacity).[7]

Indeed, when a federal law regulates the litigation of federal claims or defenses in State court, the State court is acting, to some limited degree, pursuant to the authority of the United States and in fulfillment of its oath to uphold the federal Constitution. See, *e.g.*, *Printz*, 521 U.S. at 925-29 (analyzing justification for requiring State courts to adjudicate federal claims). However, in the absence of a federal claim or defense, a State court is necessarily acting solely pursuant to its authority under State law. Thus, a federal law that directly regulates State-court procedures in that circumstances is, in essence, regulating the State court's exercise of authority received from another sovereign—the State itself.

Thus, if a decision on this issue were required in this case, *Amici* would ask that the Court adopt a bright-line rule forbidding Congress to regulate State-court procedure in the

---

[7] In that respect, Section 1367(d) is far more intrusive than the handgun law that this Court struck down in *Printz*, and the federal naturalization requirements discussed at length by the majority and dissent in that case. 521 U.S. at 950; *id.* at 970-71 (Souter, J., dissenting). There, at least, Congress was regulating State officials' implementation of federal law, whereas Section 1367(d) purports to regulate State officials' implementation of *State* law. As the Court put it in *Alden*:

> [i]t would be an unprecedented step . . . to infer from the fact that Congress may declare federal law binding and enforceable in state courts the further principle that Congress' authority to pursue federal objectives through the state judiciaries exceeds . . . its power to press other branches of the State into its service.

527 U.S. at 752.

absence of a substantive federal claim or defense, validly created pursuant to a separate grant of Constitutional authority. See Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 952 (2001) (arguing that "Congress has no authority to prescribe procedural rules for state courts to follow in state law cases"). And, if it were necessary, *Amici* would ask the Court to apply that bright-line rule in this case and hold that, whether or not Section 1367(d) is "necessary" to Congress's exercise of its authority over inferior federal courts, it plainly is not "proper" because it represents an improper intrusion upon State sovereignty, as applied to any defendant.

B. There Is Ample Support For The Narrower Conclusion Of The Court Below That Extending Section 1367(d) To Political Subdivisions Of Non-Consenting States Exceeds Congress's Powers Under Articles I And III.

Although the extension of a State's statute of limitations with respect to any defendant is itself a significant and unwarranted intrusion upon State sovereignty, the Court need not rest its decision on that general intrusion. That is because, in this case, the defendant is a political subdivision of the State and is subject to suit under State law only because the State has made a conditional waiver of its subdivision's sovereign immunity. Accordingly, petitioner's interpretation of Section 1367(d) would work a separate intrusion upon State sovereignty, namely, a State's authority to set the conditions on which to waive, not only its own immunity, but also the immunity of its political subdivisions under State law.

1. There can be no serious doubt that the ability to control the waiver of a political subdivision's sovereign immunity is an important attribute of sovereignty. For example, political subdivisions of the United States—including its territories and the District of Columbia—have traditionally enjoyed the sovereign immunity of the United

States except to the extent a waiver has been mandated or allowed by Congress. *E.g.*, *Marx* v. *Government of Guam*, 866 F.2d 294, 298 (9th Cir. 1989) ("[T]he government of Guam has inherent sovereign immunity."). And the ability to control the terms on which such waivers occur, including the procedures and timetables under which claims will be litigated, is certainly an important attribute of the sovereignty of the United States. *Sun Oil Co.*, 486 U.S. at 726 (holding that the right to determine the statute of limitations is a fundamental aspect of State sovereignty).

The same is true with the States. A county or a municipal corporation is as much a creature of a State as a territory is a creature of the United States. As this Court recently said, "'political subdivisions are components of'" the State. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. at 2232. Just as a territory derives its authority and, indeed, its very juridical existence from the United States, so also cities and counties derive their existence and authority from the States. See, *e.g.*, S.C. Const. art. VIII, § 1 ("The powers possessed by all counties, cities, towns, and other political subdivisions at the effective date of this Constitution shall continue until changed in a manner provided by law."). And, just as a territory or the District of Columbia can exercise only those powers conferred upon it by Congress (see U.S. Const. art. I, § 8, cl. 18; *id.* art. IV, § 3, cl. 2), so also a city or county can exercise only those powers conferred upon it by the State that created it. See, *e.g.*, Haw. Const. art. VIII, § 1 ("Each political subdivision shall have and exercise such powers as shall be conferred under general laws.").

Indeed, throughout our history, States have employed their political subdivisions to carry out much of the States' work in serving their citizens. In colonial times, for example, "Massachusetts had virtually no administrative apparatus of its own but used the towns for such purposes as tax gathering. In the 1830s Tocqueville observed this feature of government in New England and praised it for its ideal combination of

centralized legislation and decentralized administration." S. Beer, *To Make a Nation: The Rediscovery of American Federalism* 252 (1993). Even today, many if not most States provide a host of essential services, not directly, but through the cities, counties and towns that they have created, and for which they often provide a large part of the funding.

In short, as this Court recently put it, "'local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. at 2232 (citing *Wisconsin Pub. Intervenor*, 501 U.S. at 607-08). Accordingly, "a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision." *Id.* at 2230. Given that political subdivisions are creatures of the State, it follows that any federal rule that alters the relationship between a State and its political subdivisions is an intrusion into State sovereignty.

Moreover, just as the United States claims for itself the right to control the terms on which its political subdivisions will be subject to suit, as well as their potential liability, so also do the States claim that same authority with respect to their political subdivisions.[8] In short, a State's ability to control the terms on which its political subdivisions are subject to suit, as well as their potential liability, is as

---

[8] *See, e.g.*, *McMillian* v. *Monroe County, Ala.*, 520 U.S. 781, 789 (1997) (citing Alabama's sovereign immunity provision, which specifies that a county sheriff is absolutely immune from all suits for damages based upon his official acts); *State* v. *Hogg*, 535 A.2d 923, 927 (Md. 1988) ("[T]he State's sovereign immunity not only protects the public treasury but also protects the State and its instrumentalities from standing trial."); *Gray-Hopkins* v. *Prince George's County, Md.*, 309 F.3d 224, 232 (4th Cir. 2002) (holding that while the counties' governmental immunity is "'much narrower than the immunity of the State, [it is] nevertheless . . . derived from the State's sovereign immunity.'").

important an aspect of State sovereignty as it is of federal sovereignty.

For all these reasons, the States have an even stronger interest in controlling the terms on which State-law claims will be litigated in State court against their own political subdivisions than they do in controlling the terms on which such claims will be litigated against other defendants.

2. Here, the South Carolina Torts Claims Act governs claims against the State's political subdivisions. That Act states unequivocally that "an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered." S.C. Code Ann. § 15-78-100(a). Petitioner's interpretation of Section 1367(d) would essentially override that portion of the statute which reads "two years," replacing it with the phrase "at least three years and two months." And it would do so, not in federal court, but in the State's own courts.

Admittedly, there may be sensible policy reasons for such a rule—if, that is, one were to view the United States and the States as part of a single sovereign entity. However, as noted above (*supra* at 11), this Court's decisions make clear that Congress cannot treat the States as mere "prefectures or corporations" of a single, national sovereign. *Alden*, 527 U.S. at 758. Under petitioner's interpretation of Section 1367(d), the statute impinges on State sovereignty and thus can be sustained only if the Constitution authorizes it expressly or by necessary implication.

3. Neither petitioner nor the United States attempts to make this requisite showing. Instead, they deny that such a showing is necessary because (in the words of the United States) "[t]he South Carolina Supreme Court's reference to 'the State's sovereign authority to establish the terms under which its political subdivisions may be sued' . . . posits a constraint on *federal* power that does not exist." U.S. Br. at 33 (citation omitted). They reason that, unlike States

themselves, cities and counties have no *Eleventh Amendment* immunity from suit under this Court's decisions. *Id.* at 32 (citing *Alden*, 527 U.S. at 756; *Board of Trs.* v. *Garrett*, 531 U.S. 356, 368-69 (2001); *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977)). They then reach the unqualified and sweeping conclusion that, because cities and counties have no Eleventh Amendment immunity, their "susceptibility to private suits is subject to *congressional* control, notwithstanding the contrary preferences of state officials." *Id.* at 33 (emphasis added).

This remarkable conclusion is fundamentally wrong, not only as a matter of federalism, but as a matter of logic. The fact that cities and counties do not enjoy complete *Eleventh* Amendment immunity from suit does not, for purposes of the *Tenth* Amendment, diminish the intrusion upon State sovereignty of a provision that (as interpreted by petitioner) deprives the States of their traditional ability to set the terms on which their own political subdivisions will be subject to suit under the State's own laws, in the State's own courts. See *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). The two facts simply have no logical connection. Nor does the absence of such immunity effectively make cities and counties creatures of the federal government rather than the States, as the United States seems to imply.

Moreover, the attempt by petitioner and the United States to answer a Tenth Amendment question with an analysis of this Court's Eleventh Amendment jurisprudence was squarely rejected in *Printz*. As the Court put it there, "the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here. We long ago made clear that the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity [and] we have refused to apply it to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment." 521 U.S. at 931 n.15 (citations omitted).

Thus, to establish the constitutionality of their interpretation of Section 1367(d), as applied to cities and counties, petitioner and the United States would have to identify some provision of the Constitution that—expressly or by necessary implication—authorizes a significant abridgment of State sovereignty. See *supra* at 16-17. That they do not even attempt to meet that burden is sufficient to establish a genuine doubt as to the constitutionality of that provision, as they interpret it.

Nor is it clear how any theory that would authorize this intrusion upon State sovereignty—based on the Constitution's "inferior courts" provisions or Section 5 of the 14th Amendment—would not also authorize even more sweeping intrusions. If Congress has the authority under those provisions to toll the limitations period on claims against political subdivisions where the claim has previously been pending in federal court, why could it not simply establish a single, national limitations period, applicable in both State and federal court, for *all* State-law claims against a State's political subdivisions? Proponents of such a rule would no doubt argue that it derives from Congress's power to establish inferior courts because it would ensure that plaintiffs from different States would be treated "fairly" with respect to each other when they bring their actions in federal court. But it would represent an enormous intrusion upon the management of State-court litigation against State-created entities.

Similarly, if Congress has the authority under the "inferior courts" provisions or Section 5 to toll the limitations period on State-law claims against political subdivisions, why can it not also regulate other aspects of State procedure applicable to such claims, such as rules regarding pleading and discovery, so as not (according to Congress's preferences at the time) to artificially encourage or discourage the filing of such claims in federal court? Here again, the theories suggested by the petitioner and the United States would seem to have no logical stopping point.

4. Finally, even if some authority could be found in the Constitution for application of Section 1367(d) to a State's political subdivisions, that action would still be too great an intrusion upon State sovereignty to be "proper" under this Court's precedents. As explained above, Section 1367(d) is a very significant intrusion upon State sovereignty when applied to any defendant. However, it is a truly enormous intrusion when applied to a State's political subdivisions.

To appreciate the importance of this intrusion, imagine a federal law that preempted State laws limiting punitive damage awards to $250,000. (Under the theory advanced by petitioner and the United States, Congress would appear to have this authority, inasmuch as the State-law cap would otherwise constrain the amount of punitive damages that could be awarded on State-law claims in federal court.) It would be one thing for Congress to preempt that cap as to private defendants, thereby forcing them to bear the risk of billion-dollar punitive awards. But it would be quite another for Congress to subject State-created cities and counties to such awards. Such judgments could have a significant impact on the States' ability to ensure the provision of necessary governmental services to their citizens, and they could well have an even more direct financial impact on the States themselves.

If interpreted to apply to political subdivisions, Section 1367(d) would implicate the same concerns. Although that statute may not have as great an impact on the amount of potential liability to which political subdivisions are subject, it would have the effect of preserving claims against political subdivisions that otherwise would have expired. Thus, to some extent, the extension of Section 1367(d) to political subdivisions would hinder the States' ability, through those subdivisions, to provide needed government services to the States' citizens.

In short, in this case, as in *Alden*, the authority asserted by petitioner and the United States is, in essence, the power "to

press a State's own courts into federal service to coerce the other branches of the State"—in this case the State's own political subdivisions. 527 U.S. at 749 (citation omitted). Here, as there, that authority "is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals." *Id.* And here, as there, "[s]uch plenary federal control of state governmental processes denigrates the separate sovereignty of the States." *Id.*

For all these reasons, there is at least a serious doubt as to the constitutionality of Section 1367(d) as applied to the States' political subdivisions. This Court can and should avoid that constitutional issue by adopting a narrow construction of that statute, as it did in *Raygor*.

II. PETITIONER'S INTERPRETATION SHOULD BE REJECTED FOR THE SEPARATE REASON THAT SECTION 1367(d) DOES NOT CONTAIN A CLEAR STATEMENT OF CONGRESSIONAL INTENT TO REACH CLAIMS AGAINST THE STATES' POLITICAL SUBDIVISIONS.

Even if this Court were not persuaded that petitioner's interpretation of Section 1367(d) created a sufficient doubt as to its constitutionality, that interpretation should still be rejected under the "clear statement" rule articulated in *Raygor* by both the majority and concurring opinions. *Raygor*, 534 U.S. at 541 ("Congress . . . must make its intention to abrogate unmistakably clear in the language of the statute") (internal quotation marks omitted); *id.* at 549 (Ginsburg, J., concurring) ("if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute") (internal quotation marks omitted).

1. This Court has long held that, even in the absence of a strong constitutional doubt, a federal statute should not be

interpreted in a manner that alters the balance between federal and State governments absent a clear statement to that effect in the federal legislation. For example, in *New York* v. *United States*, the Court declined to construe a provision of the Radioactive Waste Policy Act of 1985 as a "mandate to regulate" based on the principle that, where a particular reading of a statute would "'upset the usual constitutional balance of federal and state powers . . . it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.'" 505 U.S. at 170 (citation omitted). And this Court recently resisted adopting an interpretation of a federal criminal statute because "it invite[d] [the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland* v. *United States*, 531 U.S. 12, 24 (2000). The Court then reiterated the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* (internal quotation marks omitted) (citing *Jones* v. *United States*, 529 U.S. 848, 858 (2000)).

The Court articulated the same principle in *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), when it was asked to read a provision of the federal bankruptcy code as allowing a case-by-case inquiry into whether the price paid at a foreclosure sale is a "fair market price"—a matter traditionally left to determination under State law. The Court rejected the invitation on the ground that the bankruptcy code expressed no clear congressional intention to that effect. As the Court put it,

> Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national

> authority, those charged with the duty of legislating [must be] reasonably explicit."

Id. at 544 (alterations and omissions in original). See also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (holding that "such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result"); *Solid Waste Agency* v. *U.S. Army Corps of Engr's*, 531 U.S 159, 174 (2001) (explaining that Congress did not express an explicit desire to readjust the federal-state balance).

2. This same principle was applied by both the majority and concurrence in *Raygor*, and there can be no doubt that the principle applies here as well. As the *Raygor* majority put it, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." 534 U.S. at 543 (internal quotation marks omitted) (quoting *Will*, 491 U.S. at 65). See also *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-61 (1991); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). The *Raygor* majority cited this principle as a basis for rejecting the argument that Section 1367(d) could be applied to toll a State statute of limitations against a non-consenting State:

> [A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity. Thus, applying the clear statement principle helps "'assur[e] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'"

534 U.S. at 544 (second alteration in original) (citing *Will*, 491 U.S. at 65). The concurrence expressed agreement with this conclusion and referred to the clear-statement as an

"ordinary rule of statutory construction." *Id.* at 548-49 (Ginsburg, J., concurring) (internal quotation marks omitted) (quoting *Will*, 491 U.S. at 65).

Under *Raygor*, the clear-statement rule is equally applicable here. As explained at length above (*supra* at 26-27), petitioner's interpretation of Section 1367(d) would substantially alter the traditional balance between federal and state governments in at least two respects. First, it would deprive the States of their traditional authority to fix the limitations periods and tolling rules applicable to State-law claims litigated in State courts. Second, as the court below correctly held, it would intrude upon the States' traditional authority to fix the terms on which it waives the sovereign immunity of its political subdivisions under State law. Thus, as in *Raygor*, petitioner's interpretation "at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity." 534 U.S. at 544.

3. Finally, in light of *Raygor*, it cannot be seriously maintained that Section 1367(d) extends with sufficient clarity to the kinds of claims at issue here.

Significantly, neither petitioner nor the United States even attempts to demonstrate that Section 1367(d) contains the requisite "clear statement" of congressional intent to toll a State statute of limitations as to State-law claims asserted against a political subdivision of a State. And with good reason: *Raygor* itself held that, however broadly Section 1367(d) may be phrased, such "general language [is] insufficient to satisfy clear statement requirements." *Id.* at 545. Instead, the Court held that Congress's intention to reach State defendants must be both "specific" and "unequivocal."

Here, the general language of Section 1367(d), while admittedly broad, does not "specifically" or "unequivocally" toll the State-law statute of limitations against a political

subdivision of a State, any more than it "specifically" or "unequivocally" tolls a State-law statute of limitations against an "arm" of a State such as the State university in *Raygor*. Accordingly, petitioner's interpretation of that provision cannot be squared with *Raygor*, and must be rejected.

* * * *

Amici urge the Court to do here what it did in *Raygor*, specifically, to construe Section 1367(d) as excluding claims against this defendant and similarly situated State-created entities. That will allow the Court to save for another day—and a more appropriate case—the question of whether Section 1367(d) is constitutional as applied to *any* defendant. It will also allow Congress, if it truly believes political subdivisions *should* be subject to Section 1367(d), to pass a statute making that clear, thereby providing an opportunity for this Court to decide definitively whether that action is within Congress's power.

CONCLUSION

For all these reasons and those in respondents' brief, the decision of the Supreme Court of South Carolina should be affirmed on the basis of a narrow construction of Section 1367(d).

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
NATHAN A. FORRESTER
SOLICITOR GENERAL
OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

CARTER G. PHILLIPS
GENE C. SCHAERR*
SUSAN A. WEBER
DEREK E. BROWN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

KEN SALAZAR
ATTORNEY GENERAL
STATE OF COLORADO
1525 Sherman Street
7th Floor
Denver, CO 80203
(303) 866-3557

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

THURBERT E. BAKER
ATTORNEY GENERAL
STATE OF GEORGIA
40 Capitol Sq. SW
Atlanta, GA 30334
(404) 656-4585

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1282

STEVE CARTER
ATTORNEY GENERAL
STATE OF INDIANA
Indiana Govt. Center
S. 402 W. Washington St.
5th Floor
Indianapolis, IN 46204
(317)-232-6201

THOMAS J. MILLER
ATTORNEY GENERAL
STATE OF IOWA
Hoover State Office Bldg.
1305 E. Walnut
Des Moines, IA 50319
(515) 281-3053

CARLA J. STOVALL
ATTORNEY GENERAL
STATE OF KANSAS
120 S.W. 10th Ave.
2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI
P.O. Box 220
Jackson, MS 39205
(601) 359-3824

JEREMIAH W. ("JAY") NIXON
ATTORNEY GENERAL
STATE OF MISSOURI
207 West High Street
Jefferson City, MO 65102
(573) 751-3321

DAVID SAMSON
ATTORNEY GENERAL
STATE OF NEW JERSEY
R. J. Hughes Justice Complex
25 Market Street.
Trenton, NJ 08625
(609) 292-4925

WAYNE STENEHJEM
ATTORNEY GENERAL
STATE OF NORTH DAKOTA
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

W.A. DREW EDMONDSON
ATTORNEY GENERAL
STATE OF OKLAHOMA
2300 N. Lincoln Blvd.
Ste. 112
Oklahoma City, OK 73105
(405) 521-3921

CHARLIE CONDON
ATTORNEY GENERAL
STATE OF SOUTH CAROLINA
Rember C. Dennis Office
Bldg.
P.O. Box 11549
Columbia, SC 29211-1549

PAUL G. SUMMERS
ATTORNEY GENERAL AND
REPORTER
STATE OF TENNESSEE
P.O. Box 2027
Nashville, TN 37202
(615) 741-5860

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-2868

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, VA 23219
(804) 786-2071

Counsel for Amici Curiae

January 15, 2003 * Counsel of Record